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In the

Supreme Court of the United States

October Term, 1966

Nos. 352 & 359

Betty Levin,

Petitioner,

—v.—

Mississippi River Fuel Corporation, *et al.*,

Respondents.

Allegheny Corporation, *et al.*,

Petitioners,

—v.—

Mississippi River Fuel Corporation, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT MISSOURI PACIFIC RAILROAD COMPANY

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INDEX

	Page
Questions Presented	2
Statutes Involved	3
Statement	4
The Plan of Consolidation and the Application to the Commission	4
The Proceedings in the District Court	6
The Decision of the Court of Appeals	8
Summary of Argument	12
Argument	21
Preliminary and General	21
1. The Context of this Case	21
2. The Background of the Governing Federal Law	25
I. MoPac's Articles of Association do not Purport to Provide for a Class Vote on the Consolidation Proposed Here	38
II. The Missouri Business Corporation Law is Not "Applicable State Law" to Which Section 5(11) Defers	48
III. Even if the Missouri Business Corporation Law Were "Applicable State Law," it Would Not Give Effect to the Provisions of the Articles With Respect to a Class Vote Even Assuming That MoPac's Articles Required a Class Vote	56

Page

IV. Section 5(11) of the Interstate Commerce Act Incorporates by Reference Only State Law Voting Requirements Which are Imposed as a Matter of Mandatory State Policy; it does not Incorporate by Reference Votes Provided for in Corporate Articles of Incorporation and Given Effect to by a State Statute of an "Enabling Act" Nature 66

V. Section 5(11) of the Interstate Commerce Act Permits Only the Incorporation by Reference of State Law Requirements for a Greater-Than-Majority General Vote, Not State Law Requirements for a Class Vote, on a Merger or Consolidation 88

Conclusion 94

Appendix—Statutory Provisions 1a

1. Sections 351.020, 351.090 and 351.430, Missouri Revised Statutes 1a

2. Chapter 388, Missouri Revised Statutes 7a

CITATIONS

Cases:

Aldridge v. Franco Wyoming Oil Co., 24 Del. Ch. 349, 14 A.2d 380 (Sup. Ct. 1940) 59

Alleghany Corp. v. Breswick & Co., 353 U.S. 151 (1957) 72

Benintendi v. Kenton Hotel, 294 N.Y. 122, 60 N.E.2d 829 (1945) 59

Byrd v. Blue Ridge Rural Cooperative, 356 U.S. 525 (1958) 46

Chicago & N.W.-Chicago Great W., I.C.C. Fin. Dkt. No. 23,388 88

Page

Chicago & N.W.-Chicago, Milwaukee & St. P., I.C.C. Fin. Dkt. No. 24,182 88
County of Leavenworth v. Chicago, R. I. & Pac. R. Co., 25 Fed. 219 (C.C.W.D. Mo. 1885), aff'd, 134 U.S. 688 (1890) 51
County of Marin v. United States, 356 U.S. 412 (1958) 13, 26, 27, 68
Estate of Spiegel v. Commissioner, 335 U.S. 701 (1949) 46
General Box Co. v. United States, 351 U.S. 159 (1956) 46
Illinois Cent. R. Co. v. United States, N.D.Ill., Aug. 4, 1966, slip opinion 39
Kaplan v. Block, 183 Va. 327, 31 S.E.2d 893 (1944) 60
McLean Trucking Co. v. United States, 321 U.S. 67 (1944) 27
Merger of Subsidiary Companies with Boston & M. R. Co., 76 I.C.C. 797 (1923) 26
Minneapolis & St. L. R. Co. v. United States, 361 U.S. 173 (1959) 27
Missouri Pac. R. Co. Reorganization, 239 I.C.C. 7 (1940), approved, In re Missouri Pac. R. Co., 39 F.Supp. 436 (E.D. Mo. 1941) 41
Missouri Pac. R. Co. Reorganization, 290 I.C.C. 477 (1954) 40, 41, 42
In re Missouri Pac. R. Co., 64 F.Supp. 64 (E.D.Mo. 1945), aff'd, 163 F.2d 350 (8th Cir. 1947), aff'd, 335 U.S. 211 (1948) 41
In re Missouri Pac. R. Co., 93 F.Supp. 832 (E.D.Mo. 1950) 41
Moss Estate, Inc. v. Metal & Thermit Corp., 73 N.J. Super. 56, 179 A.2d 54 (Ch. 1962) 44, 45
New York Cent. R. Co. Merger, 312 I.C.C. 417 (1961) 5
Pitcairn v. American Refrigerator Transit Co., 101 F.2d 929 (8th Cir. 1939), cert. denied, 308 U.S. 566 (1939) 38
Propper v. Clark, 337 U.S. 472 (1949) 46

Page

Richards v. United States, 369 U.S. 1 (1962) 46
Rock Island System Consolidation, 193 I. C. C. 395 (1933) 26
Schwabacher v. United States, 334 U.S. 182 (1948) 13, 22, 27, 29, 47, 68, 77, 81, 86
Seaboard Air Line R. Co.—Merger—Atlantic Coast Line R. Co., 320 I.C.C. 122 (1963) 22
Sellers v. Joseph Bancroft & Sons Co., 23 Del. Ch. 13, 2 A.2d 108 (1938) 45
Standard Power & Light Corp. v. Investment Associates, 51 A.2d 572 (Del. Sup. Ct. 1947) 59
Steele v. General Mills, Inc., 329 U.S. 433 (1947) 35, 36
St. Joe Paper Co. v. Atlantic Coast Line R. Co., 347 U.S. 298 (1954) 73, 91
Texas v. United States, 292 U.S. 522 (1934) 72
United States v. Durham Lumber Co., 363 U.S. 522 (1960) 46
Wood v. United States, 132 F. Supp. 586 (S.D.N.Y. 1955) 26, 27

FEDERAL STATUTES:

Interstate Commerce Act, 24 Stat. 379 (1887), as amended, 49 U.S.C. §§ 1, *et seq.*

§ 5, 49 U.S.C. § 5 .....11, 19, 25, 26, 28, 30, 37, 65, 81

§ 5(2), 49 U.S.C. § 5(2) 3, 6, 12, 21, 25, 26, 27, 38, 47, 50, 83, 86, 91

§ 5(11), 49 U.S.C. § 5(11) .....passim

§ 20a, 49 U.S.C. § 20a 6

§ 20b, 49 U.S.C. § 20b 27, 93

§ 20b(2), 49 U.S.C. § 20b(2) 93

§ 20b(5), 49 U.S.C. § 20b(5) 93

Emergency Transportation Act of 1933, 48 Stat. 210 72

Page

Transportation Act of 1920, 41 Stat. 482 ....18, 26, 30, 52, 55, 70, 71, 72, 81, 84, 91

Transportation Act of 1940, 54 Stat. 905 (1940), as amended, 49 U.S.C. §§ 5(2), 5(11) 3, 18, 19, 21, 26, 30, 55, 68, 69, 72, 73, 81, 85, 91

28 U.S.C. § 1292(b) 8

FEDERAL LEGISLATIVE MATERIALS:

S. 1870, 69th Cong., 1st Sess. (1925) 71

S. 3840, 69th Cong., 1st Sess. (1926) 71

S. 4892, 69th Cong., 2d Sess. (1926) 71

S. 1175, 70th Cong., 1st Sess. (1927) 71, 78

S. 5817, 70th Cong., 2d Sess. (1929) 71, 78

S. 6276, 71st Cong., 3d Sess. (1931), § 208(3) 79

S. 2009, 76th Cong., 1st Sess. (1939) 74

S. Rep. No. 1884, 70th Cong., 2d Sess. (1929) 78

S. Rep. No. 87, on S. 1580, 73d Cong., 1st Sess. (1933) .. 72

Hearings on S. 1870, Senate Committee on Interstate Commerce, 69th Cong., 1st Sess. (1926) 79

Hearings on S. 1175 before Senate Committee on Interstate Commerce, 70th Cong., 1st Sess. (1928) 71, 78

Hearings on S. 1310, S. 2016, S. 1869 and S. 2009 before the Senate Committee on Interstate Commerce, 76th Cong., 1st Sess. (1939) 76

H. R. 11212, 69th Cong., 1st Sess. (1926) 56, 71

H. R. 5641, 70th Cong., 1st Sess. (1927) 71

H. R. 12620, 70th Cong., 1st Sess. (1928) 71

Page

H. R. Doc. 394, 74th Cong., 2d Sess. (1936) 92

H. R. 2531, 76th Cong., 1st Sess. (1939) 76

H. R. Rep. No. 16, 73d Cong., 1st Sess. (1933) 72

Hearings on H. R. 11212, House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. (1926) 56

Hearings on H. R. 9059 before House Committee on Interstate and Foreign Commerce, 72d Cong., 1st Sess. (1932) 72

Hearings on H. R. 2531 before House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess. (1939) 73, 76

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS:

Ala. Code, tit. 10, § 21(4)10 67

Ala. Code, tit. 10, § 21(66) 43

Alaska Rev. Stat. § 10.05.390 43

Alaska Rev. Stat. § 10.05.801 67

Ariz. Rev. Stat. § 10-344 63

Ark. Stat. § 64-222 67

Calif. Corp. Code

§ 2201(b) 29

§ 4107 ..... 29, 57

§ 4123 29

Colo. Rev. Stat. § 31-4-18 67

Colo. Rev. Stat. § 31-33-3 43

Conn. Gen. Stat. Rev. § 33-286 82

Conn. Gen. Stat. Ann. § 33-329 60

Page

Del. Code Ann., tit. 8
§ 102(b)(4) 67
§ 251(c) 29
§ 262 29
Del. Rev. Code (1935), § 2037 81
Hawaii Rev. Laws § 173-4 ..... 57, 78
Ill. Rev. Stat. c. 32
§ 157.64 58
§ 157.65 64
§ 157.146 ..... 59, 67, 81
§ 157.3 82
§ 157.63 29
§ 157.64 43
§ 157.70 29
§ 157.73 29
Ill. Rev. Stat. c. 114, § 1 82
Ill. Rev. Stat. c. 114, § 39 78
Ill. Laws 1957, p. 2192 65
Iowa Code Ann. § 476.4 78
Iowa Code Ann. § 496a.70 43
Iowa Code Ann. § 496a.138 67
Kan. Gen. Stat. Ann. § 17-2803(G) 67
Mass. Gen. Laws Ann. c. 156B, § 8 67
Mass. Gen. Laws Ann. c. 156, § 46(B) 57
Md. Corp. Code § 5 81

Page

Md. Rev. Stat. § 23-207 78

Mich. Comp. Laws § 450.3 82

Mich. Stat. Ann. § 21.52 57

Mich. Stat. Ann. § 22.201 82

Miss. Code Ann. § 5309-151 43

Miss. Code Ann. § 5309-301 67

Mo. Const. 1875, Art. XII, § 17 51

Mo. Const. 1945, Art. XI, § 10 54

Mo. Rev. Stats. c. 351

§ 351.090 ..... 60, 64

§ 351.095 64

§ 351.230 54

§ 351.270 ..... 2, 9, 11, 17, 57, 58, 59, 61, 62, 63, 64, 65, 66, 80, 81

§ 351.405 29

§ 351.420 54

§ 351.425 ..... 34, 57, 89

§ 351.430 64

§ 351.455 29

§ 351.458 57

§ 351.690(3) 49, 52

Mo. Rev. Stats. c. 388

§ 388.290 ..... 49, 51, 52

§ 388.290(4) 52

§ 388.290(6) 54

Page

§ 388.300 ..... 50, 51, 52

§ 388.300(2) 54

Mo. Laws 1869, p. 75 50

Mo. Laws 1870, p. 89 (Act of March 24, 1870) 51

Mo. Laws 1870, p. 24 (Act of March 25, 1870) 51

Neb. Rev. Stat. § 21-20, 128 67

Nev. Rev. Stat. § 78.470 ..... 29, 57

Nev. Rev. Stat. § 78.505 29

N. C. Gen. Stat. § 55-66 67

N. D. Rev. Code § 10-19-34 67

N. H. Rev. Stat. § 294:42 57

N. J. Rev. Stat. § 48:12-129 78

N. M. Stat. Ann. § 69-2-2 78

N. Y. Bus. Corp. Law § 616 ..... 63, 69

N. Y. Bus. Corp. Law § 616(2) 61

N. Y. Bus. Corp. Law § 617 ..... 62, 69

N. Y. Bus. Corp. Law § 617(c) 69

N. Y. Bus. Corp. Law § 903 ..... 29, 43

N. Y. Bus. Corp. Law § 910 29

N. Y. Railroad Law § 5 82

Ohio Gen. Code § 86.23-49 (former) 81

Ohio Rev. Code Ann. § 1701.79(B) 43, 62

Okla. Stat., tit. 18, § 1.166a(3) 63

Ore. Rev. Stat. § 57.686 67

Pa. Stat. Ann., tit. 15, § 2852-902(C) 63

Page

S. D. Bus. Corp. Act § 131 67

Tenn. Code. Ann. § 65-910 78

Texas Bus. Corp. Act

art. 2.01(4)(e) 82

art. 5.03 78

art. 5.03(A) 29

art. 5.03B 43

art. 5.11A(2) 29

art. 9.08 67

Texas Rev. Civil Stat. art. 6259 82

Utah Code Ann. § 16-10-136 67

Va. Code Ann. § 13.1-70 43

Va. Code Ann.

§ 13.1-33 63

§ 13.1-49(g) 63

Wash. Rev. Code, tit. 23, § 154 67

Wash. Rev. Code § 81.36.070 78

Wisc. Stat. Ann. § 180.90 67

Wisc. Stat. Ann. § 190.06 78

Wyo. Stat., tit. 17, § 36.119 67

TREATISES, STATE LEGISLATIVE MATERIALS, PERIODICALS, AND MISCELLANEOUS:

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Comment, Iowa Code Ann., book 28B, p. 222 ..... 63, 80

Page

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Elliott, Railroads (3d ed. 1921) 82

1 Fletcher, Cyclopaedia Corporations (1963), § 148 82

15 Fletcher, Cyclopaedia Corporations (1961 revision), § 7041 4

Gibson, How Fixed Are Class Shareholder Rights?, 23 Law & C. Probs. 283 (1958) 29

Gibson, The Virginia Corporation Law of 1956, 42 Va. L. Rev. 445 (1956) 63

Hornstein, Analysis of [N.Y.] Business Corporation Law McKinney's Consol. Laws of N.Y. Ann., book 6 (vol. 2) 62, 80

Hornstein, Corporation Law & Practice (1959), § 77 5

ICC Ann. Rep. (1938) 92

ICC Special Instructions Governing Certain Proceedings Under Section 5 of the Act, April 9, 1934 85

Illinois Business Corporation Act Annotated (1966 pocket part) 80

Lattin, Minority and Dissenting Shareholders' Rights in Fundamental Changes, 23 Law & C. Probs. 307 (1958) 29

Leonard, Railroad Consolidation Under the Transportation Act of 1920 (1946) 70

Page

McKinney's Consol. Laws of N.Y. Ann., book 6 (vol. 1), p. 389 62

Model Business Corporation Act (1950) 81

§ 67 42

§ 136 ..... 59, 63, 67

Note, 62 Harv. L. Rev. 526 (1949) 80

Note, Statutory Assistance for Closely Held Corporations, 71 Harv. L. Rev. 1498 (1958) 60

Note, 72 Harv. L. Rev. 1132 (1959) 29

1 O'Neal, Close Corporations (1958) 59, 63, 67, 80

Report of Committee Appointed September 20, 1938, by the President of the United States to Submit Recommendations Upon the General Transportation Situation (1938) 73

Revisers' Notes and Comments on Business Corporation Law, Fifth Interim Report, Joint Legislative Committee to Study the Revision of Corporation Laws, N. Y. Legis. Doc. No. 12, 184th Sess. (1961) 63

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17A Vernon's Annotated Mo. Stat., p. iv 58

49 C.F.R. § 52.3(b)(1) 83

49 C.F.R. § 52.3(b)(5) 85

IN THE

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OCTOBER TERM, 1966

Nos. 352 & 359

BETTY LEVIN,

Petitioner,

—v.—

MISSISSIPPI RIVER FUEL CORPORATION, *et al.*,

Respondents.

ALLEGHANY CORPORATION, *et al.*,

Petitioners,

—v.—

MISSISSIPPI RIVER FUEL CORPORATION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT MISSOURI PACIFIC RAILROAD COMPANY

QUESTIONS PRESENTED

1. Are the provisions of Section D of Article VII of the Articles of Association of Missouri Pacific Railroad Company ("MoPac"), which do not expressly require a stockholder "class vote" on a consolidation, to be read as requiring by implication such a class vote?

2. If so, is the Missouri General and Business Corporation Law (Chapter 351 of the Missouri Revised Statutes), as held by the Court of Appeals, "applicable State law" to which the provisions of Section 5(11) of the Interstate Commerce Act make reference in this case, or is the Missouri Railroad Corporation Law (Chapter 388) "applicable State law," if indeed there is any "applicable State law"?

3. If the MoPac Articles are to be read by implication as requiring a class vote, and if the General and Business Corporation Law (Chapter 351) is "applicable State law" within the meaning of Section 5(11), does Section 351.270 thereof in any event give effect to a corporation's provision in its articles of incorporation for a class vote on a consolidation, where no provision of the General and Business Corporation Law requires a class vote on such a transaction in the absence of such a provision in the articles?

4. If question 3 is reached and answered in the affirmative, do the provisions of Section 5(11) of the Interstate Commerce Act, establishing a federal standard of a majority non-class vote to authorize a consolidation between rail carriers subject to that Act "unless a different vote is required under applicable State law, in which case the number so required shall assent," incorporate by reference a state law provision, like Section 351.270, which simply permits a particular vote to be required by the articles of

incorporation, or is Section 5(11) limited to incorporating by reference mandatory provisions of state statutory law?

5. If question 4 is reached and answered in the affirmative, can the provisions of Section 5(11) of the Interstate Commerce Act which refer to the "applicable State law" respecting the "number . . . required . . . of the votes of the holders of the shares entitled to vote of the capital stock of such corporation" be read in any event as permitting an incorporation by reference of a state law provision for a class vote, or is the provision limited to incorporating by reference state law provisions for a more-than-majority vote of all the stockholders?

STATUTES INVOLVED

This case involves Section 5(2) and Section 5(11) of the Interstate Commerce Act, as added by the Transportation Act of 1940, 54 Stat. 905, 908 (1940), as amended, 49 U.S.C. §§ 5(2) and 5(11). These provisions are set out at pp. 1a-2a of the Appendix to the Brief for Petitioner in No. 352.[1] The case also involves certain provisions of Chapter 351 (the General and Business Corporation Law) and Chapter 388 (the Railroad Corporation Law), Missouri Revised Statutes. Certain of the provisions of Chapter 351 are set out in the Brief for Petitioner in No. 352, Appendix, pp. 3a-5a, and in the Brief for Petitioners in No. 359, Appendix, pp. 2a-5a. Further portions of Chapter 351, and the relevant portions of Chapter 388, of the Missouri Revised Statutes are set out in the Appendix to this Brief, pp. 1a-7a, and pp. 7a-18a, respectively.

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[1] References to the Brief in No. 352, filed by Betty Levin, will be denoted "Levin Br.," and to the Brief in No. 359, filed by Alleghany Corporation, Rose Slayton, *et al.*, as "A-S Br."

STATEMENT

This case is before this Court on review of a judgment rendered by the Court of Appeals for the Eighth Circuit on an interlocutory appeal to it under Section 1292(b) of the Judicial Code from the District Court for the Eastern District of Missouri. The only question decided by the Court of Appeals on that interlocutory appeal was whether, under the Articles of Association of MoPac, and under the applicable provisions of Missouri law (if any) and the Interstate Commerce Act, separate "class voting" by the Class A and Class B stockholders of MoPac was required at the MoPac stockholders' meeting which was to consider approval of a certain Plan of Consolidation to which MoPac was a party. The Court of Appeals did not have before it, and there is not before this Court, any issue as to the fairness of the Plan of Consolidation, for reasons which will become evident from our review of the proceedings in the lower courts, pp. 6-9, *infra,* and for other reasons which we shall discuss below, pp. 21-23.

The Plan of Consolidation and the Application to the Commission.—In December 1963, the Boards of Directors of MoPac and of The Texas and Pacific Railway Company ("Texas & Pacific") approved an "Agreement and Plan of Consolidation" which would effect the consolidation of the two railroads.[2] MoPac, a Missouri corporation, is an inter-

[2] While a corporate "merger" and a corporate "consolidation" are related, they have certain essential differences. The following is a useful statement of the distinction: "Strictly speaking, a consolidation signifies such a union as necessarily results in the creation of a new corporation and the termination of the constituent ones, whereas a merger signifies the absorption of one corporation by another, which retains its name and corporate identity with the added capital, franchises and powers of a merged corporation." 15 Fletcher, *Cyclopaedia Corporations* (1961 revision), § 7041, p. 6. Here, the proposed consolidation would terminate the existence of

state common carrier by rail having 9079 miles of track in eleven states. Its 1965 gross revenues were $313,732,000 and its assets at year end $973,376,000. Texas & Pacific, a federal corporation incorporated by a special Act of Congress in 1871, 16 Stat. 573, is also an interstate common carrier by rail and has 1765 miles of track in three states. Its 1965 gross revenues were $72,732,000 and its assets at year end $207,091,000. In the proposed consolidation, the consolidated company was to become a Delaware corporation under the charter of The Texas & Missouri Pacific Railroad Company ("T&M"), a new Delaware corporation which had been formed for the purpose of effecting the consolidation.[3] (R. 5, 31, 52)

MoPac currently has two classes of equity securities: Class A Stock, of which there are outstanding 1,849,576 shares, and Class B Stock, of which there are outstanding 39,731 shares. (R. 26, 45) In the consolidation, each of these shares would become four shares of the $25 par value common stock of the new Delaware corporation, T&M. Each publicly held[4] share of the stock of Texas & Pacific

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MoPac and of Texas & Pacific, and unite their former properties and franchises in a newly formed corporation, The Texas & Missouri Pacific Railroad Company.

[3] Delaware is the most popular state for incorporation of publicly held corporations. Hornstein, *Corporation Law & Practice* (1959), § 77; Rohrlick, *Organizing Corporate and Other Business Enterprises* (3d ed. 1958), § 6.01, at 218-19. Over one-third of the corporations whose stock is listed on the New York Stock Exchange are Delaware corporations. Corporation Service Company, *1965 Digest of the Delaware Corporation Law*, p. 1. For the advantages of the resulting company in a rail consolidation being incorporated in Delaware, see *New York Cent. R. Co. Merger*, 312 I.C.C. 417, 420 (1961).

[4] Of Texas & Pacific's 445,464 shares of stock, the record shows 76,353 to be held by the public, the remainder by MoPac. (R. 25) The shares in Texas & Pacific held by MoPac would, upon the effective date of the consolidation, be likewise each changed into 4.8 shares of T&M common stock, but these shares would be held as T&M treasury shares. (R. 129-30)

would become 4.8 shares of the $25 par value common stock of T&M. (R. 5, 31, 52-53)

In January 1964, MoPac, Texas & Pacific and T&M filed a joint application before the Interstate Commerce Commission ("Commission") for orders under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), as required to authorize the proposed consolidation, and under Section 20a of the Act, 49 U.S.C. § 20a, to authorize the issuance of securities by T&M that would be incident to the consolidation. (R. 54) In that application, which is currently pending before the Commission, MoPac stated that it intended to submit the Plan to its stockholders for their approval, as contemplated by Section 5(11) of the Act, by May 1964.[5] MoPac has announced that it does not propose to hold separate class votes of its stockholders on the consolidation, but that the Class A and Class B stockholders would vote together on the consolidation in a general vote without regard to class, each share having one vote.

The Proceedings in the District Court.—Shortly after the announcement of the proposed consolidation, three lengthy complaints were filed in the District Court by the present petitioners, various holders of shares of Class B stock of MoPac,[6] naming as defendants MoPac and various

[5] There have not been any active proceedings before the Commission, and the MoPac stockholders' vote has not been held, pending the instant lawsuits.

[6] The first of these three lawsuits was brought by one Rose Slayton, the owner of ten shares of Class B stock. (R. 1-15) In the Slayton action, certain other plaintiffs, Joseph M. Proskauer, Walter Mendelsohn, Alfred L. Rose and Dorothy B. Rose, who own an aggregate of 250 shares, were permitted to intervene. (R. 15-16) The next suit was commenced by Alleghany Corporation and its voting trustee, Empire Trust Company, the holder of a majority of the Class B stock. (R. 23-37) The plaintiffs in these first two suits are currently the petitioners in No. 359. The third suit was brought by one Betty Levin, the owner of 85 shares of Class B stock. (R. 44-66) She is currently the petitioner in No. 352.

other corporations and individuals, generally including Mississippi River Fuel Corporation, the holder of a majority of MoPac's Class A stock, and various officers and directors of MoPac. (R. 1-15; 23-37; 44-66) These three complaints made, either incident to an alleged class action on behalf of MoPac's Class B stockholders or to an alleged derivative suit on behalf of MoPac, or both (R. 2; 24-25; 45; 62), various charges of wrongdoing and fraud on the part of the defendants in connection with the proposed Plan of Consolidation and otherwise. Common to all three complaints, however, was the charge that the proposal of MoPac to submit the Plan of Consolidation to its stockholders to be voted on by a general, rather than a class, vote, was contrary to law. (R. 8; 10; 34-35; 36; 53-54; 64)

MoPac filed in each of the three cases a motion to dismiss, on the grounds, generally, (i) that the principal charges of the complaints—relating to the alleged unfairness of or fraud in the Plan of Consolidation—concerned matters which were reserved exclusively to the Commission for determination, and as to which the District Court had no jurisdiction; and (ii) that with respect to the charges that a class vote of MoPac's stockholders was required—(which charges MoPac did not allege to be beyond the jurisdiction of the District Court)—the complaints demonstrated on their face that the plaintiffs were not entitled to relief. (R. 17-18; 37-39; 66-70)

The District Court ordered a limited consolidation of the three cases, and, by agreement of the parties, that portion of MoPac's motion to dismiss which related to the charge that class voting was required was severed for hearing, in advance of the other issues, by the District Court. (R. 72; 77-79) After hearing arguments solely addressed to the question of the necessity for class voting, the District

Court ruled on July 13, 1964, that class voting by MoPac's stockholders was required. (R. 90-100) The District Court thereafter amended its order to make the certification specified by Section 1292(b) of the Judicial Code with respect to interlocutory appeals. (R. 102-03) On October 14, 1964, the Court of Appeals permitted an interlocutory appeal to it from the District Court's order which overruled the motion to dismiss insofar as it was addressed to those portions of the complaint charging that the failure to provide for class voting by MoPac's stockholders was unlawful. (R. 103-04)

The Decision of the Court of Appeals.—On April 19, 1966, the Court of Appeals unanimously reversed the order of the District Court on the limited questions which were before it.

The Court of Appeals observed that, in order to make out a case for the requirement of class voting, the plaintiffs were required to demonstrate (a) that MoPac's Articles of Association, the pertinent provisions of which are set out in the margin,[7] required a class vote on a consolidation; (b) that, if so, "applicable" provisions of Missouri law give effect to this provision; and (c) that, if (a) and (b) were

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[7] Article VII, Section D:

"(3) The Company shall not, without the consent, given in writing or by resolution adopted at a meeting duly called for that purpose, of the holders of record of at least a majority of the number of shares of the Class A Stock then outstanding and at least a majority of the number of shares of the Class B Stock then outstanding, (a) issue any shares of stock of the Company of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII, (b) create or issue any obligation or security of the Company convertible into or exchangeable for shares of stock of the Company of any class, (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the

demonstrated, the provisions of Section 5(11) of the Interstate Commerce Act, which is the governing statute as to the vote required to approve a railroad consolidation, in turn incorporated by reference the Missouri law's incorporation by reference of the Articles of Association. (R. 157)

The Court of Appeals held that in order to establish the illegality of the proposal to conduct the voting on a general, rather than a class, basis, the plaintiffs had to make good all three points. It held that they had in fact made good none of them.[8]

The Court of Appeals first held that the plaintiffs had not shown that MoPac's Articles of Association, which in their provisions for a class vote do not expressly refer to mergers or consolidations at all, should be interpreted as requiring a class vote upon a consolidation. (R. 148-50, 157)

Although by itself this holding was sufficient to dispose of the case in favor of respondents, the Court of Appeals

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Class B Stock or (d) amend or eliminate any of the provisions of this paragraph (3).

"(4) Except as otherwise provided above in paragraph (3) of this Article VII, or as otherwise required by law, each share of Class A Stock and each share of Class B Stock shall have the same voting power, and the vote of the holders of all or any portion of any class of stock, as a class, shall not be required for any other action whatsoever to be taken or authorized by the stockholders of the Company, including any amendment to the Articles of Association. . . ." (R. 13-14)

[8] The opinion of the Court of Appeals summarized its holdings as follows: "But, while there are significant contrary arguments, we are not persuaded either (a) that MoPac's Articles call for a class vote on a consolidation, or (b) that, if they do, § 351.270, by its reference to the articles, demands a class vote, or (c) that, even if it does, class voting is something 'required under applicable State law'. In our view, the Class B shareholders must surmount each and all of these hurdles in order to prevail. We are not convinced that they have surmounted any of them." (R. 157)

alternatively passed on certain of the other issues in the case. The Court of Appeals considered and rejected MoPac's contention that the merger provisions of the Missouri General and Business Corporation Law,[9] Chapter 351 of the Missouri Revised Statutes, were not "applicable State law" to which paragraph (11) of Section 5 of the Interstate Commerce Act, the "exclusive and plenary" federal statute governing mergers and consolidations of interstate rail carriers, made reference. (R. 51-55) In this connection, it rejected MoPac's contention that the Railroad Corporation Law,[10] Chapter 388 of the Missouri Revised Statutes, which contains a section governing mergers, constituted the only possibly "applicable State law." (R. 150-53)—The Court of Appeals did not, in discussing "the problem of determining what is 'applicable State law' here," as to which it discussed "several possibilities" (R. 150), consider the possibility that there was *no* "applicable State law" and that, consequently, the standard of a majority vote conducted on a general basis, provided for by Section 5(11) of the Interstate Commerce Act, would prevail. Nor did it consider the possibility that the Railroad Corporation Law could be "applicable State law" regardless of whether it would have authorized the specific consolidation in question.

However, after holding that the merger provisions in the Business Corporation Law (Chapter 351) were "applicable State law," the Court of Appeals then accepted MoPac's alternative contention that, in any event, the Business Corporation Law, as a matter of Missouri law,

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[9] Hereinafter sometimes called the "Business Corporation Law" for ready reference.

[10] Chapter 388 is titled "Railroad Corporations" in the Missouri Revised Statutes, and for ready reference will be sometimes referred to as the "Railroad Corporation Law."

would not give effect to any provision of corporate articles of association or incorporation purporting to impose a class vote requirement upon a consolidation, even if MoPac's Articles had so purported.[11] (R. 153-55, 157)

The Court of Appeals then, even on the assumption that Section 351.270 of the Business Corporation Law did, as a matter of Missouri law, give effect to provisions of the Articles which purport to impose a class vote requirement upon a consolidation, proceeded to hold that Section 5(11) of the Interstate Commerce Act would not give effect to such a state law "enabling act" providing for the insertion of voluntary class votes in corporate charters, where a rail unification governed by Section 5 of the Interstate Commerce Act was involved. This was because, as the Court of Appeals held, the limited incorporation of state law requirements made by the governing federal statute, Section 5(11) of the Interstate Commerce Act, only incorporated state-law voting requirements which are set forth as *requirements* in the state statutes, and not the requirements of private articles of incorporation or association to which state law might give effect on a "permissive" or "enabling act" basis. (R. 155-57)

In the light of these holdings, the Court of Appeals did not pass on the further question whether, in any event, Section 5(11) of the Interstate Commerce Act would even incorporate by reference an express requirement in state law for a class vote, or whether its scope was limited to the incorporation by reference of state-law requirements of general votes of more than the majority of the stock

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[11] It is perfectly plain and undisputed that the Business Corporation Law does not require a class vote on a merger or consolidation absent a provision of the corporate Articles purporting to require one.

which is specified as the ordinary requirement for stockholder approval by Section 5(11).

The Court of Appeals, accordingly, reversed the order of the District Court and remanded the case for further proceedings on the other issues left unresolved.—The judgment of the Court of Appeals on this interlocutory appeal was made the subject of separate petitions for certiorari by the plaintiffs Alleghany Corporation, Empire Trust Company, and Slayton, *et al.*, on the one hand, and by the plaintiff Levin, on the other. Respondents, in opposing certiorari, reserved the right to argue, if certiorari was granted, not only that the Court of Appeals was correct with respect to the issues that it decided in respondents' favor, but that the Court of Appeals erred in holding that the merger provisions of the Missouri Business Corporation Law were "applicable State law" within the meaning of Section 5(11) of the Interstate Commerce Act; and that the issue, not reached by the Court of Appeals, as to whether Section 5(11) could in any event ever incorporate by reference a class vote, should be determined in the negative. This Court granted the petitions for certiorari. (R. 161-62)

SUMMARY OF ARGUMENT

A. This case does not involve the fairness of the Plan of Consolidation between MoPac and Texas & Pacific. Issues as to the fairness of the Plan were excluded from the interlocutory appeal to the Court of Appeals, and, in any event, are reserved to the Interstate Commerce Commission in fulfilling its duty of determining whether the terms of the proposed consolidation are "just and reasonable" as specified in Section 5(2) of the Act. The only

issue presently before this Court is whether the Court of Appeals correctly concluded that under the interlacing provisions of MoPac's Articles, the Missouri statutes, and the governing federal statute in this case, the Class B stock of MoPac was not to be vested with an absolute veto over the consolidation by reason of having a class vote on the proposal. This veto power, urged by petitioners, would be applicable not only to this consolidation but to any other rail consolidation to which MoPac might be a party.

B. The starting point for an inquiry into the basis for the assertion of petitioners that the Class B stock has such a veto power through the presence of a class vote is Section 5 of the Interstate Commerce Act. The purpose of this provision "was to facilitate merger and consolidation in the national transportation system." *County of Marin* v. *United States*, 356 U.S. 412, 416 (1958). Section 5(11) of the Act makes plain the relationship between federal and state law in a railroad merger or consolidation; and it makes it plain that the role of state law is a minimal one. Restricted to the area of shareholding voting, state law operates to displace the federal standard of a majority general vote only where a different vote is "required under applicable State law" and then only to change the "number" of the stockholders who must assent in a general vote. This is a narrowly drawn exception to the general rule of the "exclusive and plenary" character of federal law. This Court has recognized that there is little room in the statutory scheme for "reference to provisions of corporate charters and of state laws." *Schwabacher* v. *United States*, 334 U.S. 182, 199 (1948).

But it is not even necessary for the decision of this case that questions as to the relative scope of federal and

state law be resolved. There is no provision of MoPac's Articles expressly requiring a class vote upon a consolidation of the sort involved here; there is no provision of Missouri law expressly requiring any such class vote; and, indeed, there is no provision of Missouri law which even expressly gives effect to any such provision of the Articles, if one assumes that there is such a provision. Thus, in order to prevail, petitioners must establish five successive propositions (dealt with in points I through V, below); should petitioners fail to establish their position on *any* of these points, the judgment of the Court of Appeals must be affirmed.

I. MoPac's Articles of Association do not purport to provide for a class vote on the consolidation proposed here. 1. The structure of those Articles makes it plain that the requirement of a class vote is the exception, not the rule, and that the ordinary rule is that the two classes are to vote together in a general vote. The absence of any express provision for class voting on mergers and consolidations in a carefully drafted corporate charter is an indication that no such vote was intended.

2. The history of the creation of the Class A and Class B stock further confirms the fact that the voting powers of the Class B stock were to be strictly limited. The Commission's reports at the time made it plain that the Class A stock was to have "control" of MoPac. A proposal that the Class B stock be vested with as much as 4.2% of the voting power in the corporation was expressly rejected as inequitable by the Commission, which determined that the Class B stock should only have its present 2.1% of the voting power. This again supports a literal construction of the MoPac Articles, negating any expansion of the Class B's veto power.

3. Nor can it be said that the Articles require a class vote because the consolidation does certain things which are tantamount to certain of the matters which are specified in the Articles as requiring a class vote. In the first place, the Articles do not provide for a class vote on *any* merger or consolidation; the terms are irrelevant. In the second place, the consolidation does not produce a result of the sort specified in the Articles. It does not contemplate a reshuffling of the rights of the two classes of stock in the present MoPac, but the creation of a wholly new corporation in which the existing classes of stock in MoPac and in Texas & Pacific will be given securities in accordance with a plan which must be found "just and reasonable" by the Commission.

II. The Missouri Business Corporation Law is not "applicable State law" to which the majority general vote standard provided in Section 5(11) of the federal Act would defer. The Court of Appeals' holding to the contrary was reached on the basis of an erroneous assumption that there had to be some "applicable State law"—and that since, as the Court of Appeals held, the Railroad Corporation Law did not authorize the consolidation in question, the Business Corporation Law had to be "applicable State law." This approach is erroneous, first, because there might well be, in any given case, no "applicable State law," and, secondly, because the more correct approach would have been for the Court of Appeals to have looked to the provisions of the Railroad Corporation Law respecting consolidations, inasmuch as they represent the judgment of the Missouri Legislature on the appropriate vote in a rail consolidation, and inasmuch as Section 5(11) made the limitations on those provisions irrelevant.

1. The Missouri Business Corporation Law is applicable to railroad corporations only to the extent that its provisions "supplement" and are not "in conflict with the purposes of" the Railroad Corporation Law. 2. But the parallel history of the consolidation provisions of the Railroad Corporation Law and of the Business Corporation Law's antecedents, when read with certain provisions of the Missouri Constitution, make it plain that under Missouri law the Railroad Corporation Law consolidation provisions have always been viewed as exclusive, and that, accordingly, provisions in other laws with respect to consolidation are not "supplementary" to them, and are indeed "in conflict with the purposes of" the railroad consolidation laws. Indeed, certain provisions of the Missouri Constitution still in effect emphasize the exclusive nature, as far as Missouri policy is concerned, of its railroad consolidation laws.

3. On this basis, either the Court of Appeals should have taken the view that there was no "applicable State law" or it should have taken the view that the Railroad Corporation Law was "applicable State law," even though it might not have, in and of itself, authorized the transaction in question. This is because it is more appropriate, in determining what state law it is to which Section 5(11) makes reference, to look to the procedural provisions of the law which the Missouri legislature had always chosen to apply to railroad consolidations. The uniform judgment of the Missouri legislature, where it authorized rail consolidations, was that a general majority vote was sufficient to authorize them; if Section 5(11) is to defer to any state legislative judgment, it is to defer to this one.

III. Even if the Missouri Business Corporation Law were "applicable State law," it would not give effect to the

provisions of the Articles which allegedly require a class vote. 1. It is undisputed that no provision of the Business Corporation Law mandatorily requires class voting on all mergers and consolidations. Indeed, there is no requirement in Missouri—as there is in many states—for class voting on mergers and consolidations even in specifically defined situations.

2. The Missouri Business Corporation Law contains an "enabling act" provision, Section 351.270, which in certain circumstances authorizes a greater stockholder vote than that required by law. But the text of that provision does not purport to authorize a class vote in situations where none is required by law; it only extends to increasing the majority required in a general vote, or the majority required in a class vote that is otherwise required by statute. 3. The comparable "enabling act" provisions of other states make it plain that where state legislatures desire to authorize the injection of a class vote in a situation not requiring it under the mandatory provisions of the statute, they have done so explicitly. 4. And certain other provisions of the Missouri Business Corporation Law, respecting the certification of a vote by the stockholders on a merger, make it plain that the possibility of class voting on a merger was not contemplated by the Missouri statute. 5. Finally, the argument of petitioners that the provision of Section 351.270 which permits the increasing of general vote majorities to unanimity or near unanimity includes, by implication, authorization for a class vote is not logically correct; nor does it furnish a practical reason for expanding the language of the statute in the fashion suggested by petitioners.

IV. Even if one assumes that Missouri law would give effect, through an "enabling act" provision, to a voluntarily

imposed class vote on a merger, Section 5(11) of the Interstate Commerce Act would not give effect to that provision of the Articles in the case of a merger or consolidation of interstate rail carriers. Section 5(11) of the Act incorporates by reference only state law voting requirements which are imposed as a matter of mandatory state policy; it does not incorporate by reference votes provided for in corporate articles which are made effective by a state "enabling act" statute.

1. The federal policy of Section 5 is "to facilitate merger and consolidation in the national transportation system." The reference to state law in Section 5 of the Act is the exception, not the rule. The natural thrust of the text of the federal Act is only in favor of the requirements of state law, not the requirements of private corporate charters, even those permitted by state law. And the policy of the federal Act likewise favors an interpretation which would restrict the situations where a vote greater than the basic federal standard is to be required to those where the state law has chosen to impose it as a positive requirement; not to those situations where the state law indifferently gives effect to the provisions which private parties write into corporate charters.

2. The background of the Transportation Act of 1940, which brought the present Section 5(11) into the Act, strongly supports this view. One of the felt deficiencies of the 1920 Act was the fact that consolidations were procedurally governed by state law, which permitted "troublesome minorities" to tie up proposed unifications. The absence of a federal procedural standard for shareholder approval of rail consolidations was one of the problems of the 1920 Act, and a series of bills was introduced to cure it.

Both the more remote and the proximate legislative history of the 1940 Act confirm that a purpose of present Section 5(11) was to remedy the deficiencies in the procedural mechanisms provided under state law for rail consolidations.

3. The petitioners' argument thus amounts to a turning back of the clock to the 1920 Act. The deference of Congress to the general requirements of state law in Section 5(11) is an understandable deference to the requirements of mandatory general statutory voting provisions—matters of established state public policy, generally known quantities, and generally not imposing highly burdensome majority levels. But if Section 5(11) is viewed as incorporating the requirements of private articles of incorporation in any state that has an "enabling act" provision, the results could be largely subversive of Congress' purpose in enacting the consolidation provisions of Section 5. The whole basic purpose of those state "enabling act" provisions is to permit provisions allowing minority groups to block corporate action, and to vest veto powers in those groups; such provisions are "peculiarly for use by a close corporation." That purpose is totally antithetical to the purpose of the federal statute, which is not to increase the veto power of minorities but to facilitate mergers and consolidations, vesting in the Commission the plenary power and duty to see that their terms are "just and reasonable" to all classes of security holders. Moreover, these "enabling act" provisions were quite uncommon in 1940, and there is no showing that Congress had them in mind in enacting Section 5(11).

4. The argument of petitioners based on the provisions of the Commission's rules as to the exhibits to be filed

with a consolidation application, and certain recitals in the Commission's reports, are without foundation. The Commission's exhibit list does not mention anything at all about class voting; it does not purport to attach any consequences to the requirements of state law or of corporate charters. The recitals in certain Commission reports respecting the requirements of state laws, also relied upon by petitioners, are never holdings and rarely even rise to the level of *obiter dicta*. Of even less persuasiveness, if possible, is the fact that in certain cases class voting procedures may have been voluntarily followed by rail carriers proposing consolidations.

V. Even if the provisions of Section 5(11) are read to give effect to a voluntarily imposed greater-than-majority vote in corporate Articles where a state has an "enabling act" provision, they should not be interpreted as giving effect to a requirement of state law or of a corporate charter for class voting. 1. The statutory text of Section 5(11) only permits state law to vary "the number . . . of the votes of the holders of the shares entitled to vote of the capital stock of such corporation" which is required to assent to a merger. This language only permits the imposition of greater-than-majority general votes; it does not afford any enabling act for class voting; if it had been desired by the draftsman to have included a reference to class voting required under applicable state law, a few words would have sufficed. The purpose for this negation of a class vote is clear; minority classes find their protection under the Act not in a power of veto but in the duty of the Commission to scrutinize a transaction to insure that it is "just and reasonable" to all classes of stockholders.

2. The legislative history of the statute, previously reviewed, confirms this purpose. The purpose of facilitating

rail mergers and consolidations is antithetical to giving minority groups a veto power.

3. The view that Section 5(11) of the Act does not contemplate any class vote by the stockholders of a carrier participant in a rail consolidation is, finally, confirmed by the discarding of proposals for a class vote in the process of drafting the 1940 Act, and by a comparison of Section 5(11) with other provisions of the Interstate Commerce Act, regulating the corporate affairs of rail carriers, and requiring a class vote.

ARGUMENT

PRELIMINARY AND GENERAL

1. *The Context of this Case.*—We view it important to make it clear, at the outset, that this case does not involve the fairness of the Plan of Consolidation between MoPac and Texas & Pacific, either with respect to the distribution of shares in T&M, the consolidated company, as between the shareholders of MoPac and those of Texas & Pacific, or with respect to the distribution of those shares as between the holders of the two present classes of stock of MoPac. Issues as to the fairness of the Plan of Consolidation were excluded from the interlocutory appeal to the Court of Appeals. (See p. 8, *supra.*) Indeed, as the Court of Appeals recognized, the fairness of the Plan of Consolidation, although tendered by the petitioners' complaints in the District Court, does not at this point lie within the purview of the federal courts; it is, rather, reserved to the Interstate Commerce Commission, which passes upon such issues incident to its duty to find whether a proposed rail unification is "just and reasonable," as required under Section 5(2) of the Interstate Commerce

Act. See, *e.g.*, *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line R. Co.*, 320 I.C.C. 122, 190-93 (1963).

This Court described the character of the Commission's duty in this respect in *Schwabacher* v. *United States*, 334 U.S. 182, 201 (1948): "In determining whether each class of stockholders receives an equivalent of what it turns in, the Commission, of course, is under a duty to see that minority interests are protected, especially when there is an absence of arm's length bargaining or the terms of the merger have been imposed by management interests adverse to any class of stockholders."—The matter is not, then, one of the Commission's discretion, as petitioners repeatedly suggest (A-S Br. 25, 26), but of its *duty*, as this Court has said.[1]

The only issue before this Court is whether the Court of Appeals correctly concluded that under the interlacing provisions of MoPac's Articles, the Missouri statutes, and the governing federal statute in this case, the proposed consolidation involving MoPac and Texas & Pacific was to be voted on by MoPac's stockholders on the basis of a general vote,[2] or on the basis of a class vote.

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[1] The Court of Appeals thus well observed:

"[T]he merits or demerits and the fairness or unfairness of a proposed railroad consolidation are not, in the first instance, matters for our jurisdiction or our concern, or for the jurisdiction or concern of the district court. These are for the expertise of the Interstate Commerce Commission. The Act, both in § 5(11) and in § 20a(7), is specific. Commission action in this area is then subject to review by a three-judge district court, 28 U.S.C. §§ 2321-25, with direct appeal to the Supreme Court, 28 U.S.C. § 1253.

"There should be no argument as to this. The plaintiffs here do not really contend otherwise. . . ." (R. 145)

[2] A two-thirds general vote, if the Business Corporation Law is determined to be "applicable State law"; a majority general vote if the Railroad Corporation Law is "applicable State law," or if there is no "applicable State law."

If the proposed plan is unfair to the stockholders of either corporation, or to any class of those stockholders, the Commission can be relied upon so to declare. Such a declaration might well lead to appropriate modification of the plan. Indeed, should it appear to the directors of the corporations involved that the plan has become unfair or originally was unfair, or that the prospects for the Commission's favorable consideration of it are not good, they may proceed to amend the plan to provide that a larger proportion of the shares of Common Stock in T&M, the resulting corporation in the consolidation, be issued to stockholders of the class in question. Such an action is always a possibility when the question whether the plan is "just and reasonable" is committed to the determination of a regulatory body.

The issue of law asserted herein by petitioners has nothing to do with the fairness or unfairness of any particular plan of merger or consolidation. What petitioners are asserting is the right of one class of MoPac's stock to have a permanent veto power over *any* merger or consolidation to which MoPac might be a party.[3] This veto power

[3] This is because Article VII, Section D, of the MoPac Articles, which petitioners contend is applicable to a consolidation or merger, would, if the contentions of petitioners were accepted, effectively provide for a class vote in connection with the issuance of any shares of stock of any class, over and above the shares presently outstanding in MoPac, in the resulting or surviving corporation in such a merger or consolidation. Of course, every merger or consolidation, except for cases of a merger with a wholly-owned subsidiary, or the rare case in which the shareholders of one of the corporations involved received only nonconvertible debt securities or cash, would involve the issuance of such additional shares of stock.

For the text of the relevant language, see the quotation of paragraph (3) of Article VII, Section D of the Articles, at pp. 8-9, *supra*, and at pp. 38-39, *infra*. The provision in question requires a class vote to authorize the issuance of "any shares of stock of the Company of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII." Section C provides simply for the shares

would be held by a tiny class of stock—the Class B stock, of which there are only 39,731 shares outstanding, and which, in the ordinary corporate affairs of MoPac, casts only 2.1% of the total vote. This veto power would exist not only as to consolidations, like the present one, involving a subsidiary of MoPac with a large publicly-held minority stockholder interest, which MoPac desires to consummate in order to simplify its system structure, but also with respect to a merger or consolidation with a completely unaffiliated rail carrier—a merger or consolidation of the sort which is now common in the rail industry, as that industry necessarily moves toward a smaller number of units in order to preserve itself in the light of changing patterns in transportation.

Today's consolidation constitutes a simplification of MoPac's rail system through unification with a publicly-held subsidiary; tomorrow's might be a merger or consolidation with another independent carrier—a transaction essential to maintain MoPac's competitive position. The claimed veto power extends to any and all of these mergers and consolidations; and it extends to any and all of them regardless of whether the terms on which they are undertaken are conceded to be "fair," or alleged to be "unfair," with respect to the small class of stock some of whose holders are petitioners. Moreover, this veto power is asserted in the face of an Act of Congress, which we will discuss

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initially issuable to the Reorganization Managers at the time of the emergence of MoPac from its reorganization.

Moreover, it is hard to imagine any merger or consolidation, of any size in which MoPac's merger partner would not insist that the resulting or surviving corporation have a capital structure different from the present capital structure of MoPac, and that the present provision for two classes of common stock be eliminated. But under the petitioners' theories, this would also require a class vote by reason of certain other language of paragraph (3) of Article VII, Section D. See pp. 42-46, *infra*.

below (pp. 25-32, 66-82, *infra*), which was passed for the purposes—recognized by this Court, specified in its legislative history, and plain on the face of the statutory text—of facilitating and simplifying rail mergers and consolidations, and freeing them from obstacles to their consummation imposed under state law and under corporate charters. Recognition of this sort of veto power thus would have repercussions not only on MoPac but on other carriers having more than one class of stock.

2. *The Background of the Governing Federal Law.*—While the interpretation of MoPac's Articles and the determination of certain questions of Missouri law are very significant to the determination of this case, the starting point of any inquiry must be the provisions of Section 5 of the Interstate Commerce Act. That section provides procedures whereby specified transactions, such as mergers between rail carriers, consolidations involving rail carriers, certain acquisitions of control of rail carriers, and certain leases or purchases of the assets of rail carriers, may be effected upon approval by the Commission.

Section 5(2) of the Act affirmatively declares that:

> "It shall be lawful, with the approval and authorization of the Commission . . . for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation. . . . "

Section 5(2) also specifies the requirement that the Commission must find before it grants its approval that the proposed merger or consolidation is "just and reasonable" and that it is "consistent with the public interest."[4]

[4] The petitioner in No. 352 unsuccessfully urged on the Court of Appeals, and is urging on this Court, that a major portion of this determination should be made by the courts at this stage with-

These provisions of Section 5 of the Act were enacted by Congress as part of the Transportation Act of 1940, and were a revision of certain less inclusive provisions relating to mergers and consolidations which were first imported into the Interstate Commerce Act by the Transportation Act of 1920.

The overriding purpose of the rail unification provisions of the Interstate Commerce Act has been often stated by this Court:

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out reference to the Commission. Petitioner urges that the transaction in question is (apparently because it is allegedly so unfair) not a rail consolidation at all, and that this Court should now so declare and hold that it is not within the scope of § 5(2) of the Interstate Commerce Act. (Levin Br. 34-36)—Adoption of this suggestion, that the federal courts are to open their doors to a preliminary skirmish as to the "primary objective" of a transaction on its face within the jurisdiction of the Commission, would lead to a stultification of the administrative process. The present case has been pending close to three years in the courts, during which time the Commission proceedings on the application have been at a standstill. Obviously, it is no "paper" consolidation that is proposed here; the MoPac and the Texas & Pacific are both extensive common carriers by rail, and the proposal to make one carrier out of the two of them obviously contemplates a consolidation. Certainly the fact that Texas & Pacific is an approximately 83%-owned subsidiary of MoPac does not change the picture; even consolidations with a 100%-owned subsidiary are subject to the Commission's jurisdiction under § 5 of the Act. See, *e.g.*, *Rock Island System Consolidation*, 193 I.C.C. 395 (1933); *Merger of Subsidiary Companies with Boston & M. R. Co.*, 76 I.C.C. 727 (1923). It can scarcely be contended either (a) that MoPac and Texas & Pacific could consolidate without a § 5 order or (b) that they may not consolidate at all. Petitioner is really only complaining about the fairness of the plan.

The cases which petitioner cites in support of its assertion that the Court should conduct an inquest at this time over the "primary objective" of the proposed consolidation, needless to say, simply involve judicial review of Commission orders; neither of them contemplates a preliminary action in court before the Commission acts. *County of Marin* v. *United States*, 356 U.S. 412 (1958); *Wood* v. *United States*, 132 F. Supp. 586 (S.D.N.Y. 1955). Should the Commission approve the proposed consolidation, petitioner might then seek, on judicial review, to pursue the question whether

"The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act in 1940, enacting § 5(2)(a) in its present form, was to facilitate merger and consolidation in the national transportation system. . . . In order to avoid the delays incident to approval by each State through which a company operated, the Congress provided for effectuation of Commission-approved plans 'without invoking any approval under State authority.' . . . The very language of the amended 'unification section' expresses clearly the desire of the Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification." *County of Marin* v. *United States*, 356 U.S. 412, 416-18 (1958).

See also *Schwabacher* v. *United States*, 334 U.S. 182, 193-94 (1948); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 84-85 (1944); *Minneapolis & St. L. R. Co.* v. *United States*, 361 U.S. 173, 185 (1959).

Section 5(11) of the Act makes plain the relationship between federal and state law in a railroad merger or

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the consolidation so approved, with such modifications and conditions as the Commission may have then imposed, did not, because of its purposes or alleged unfairness, constitute a transaction which it was within the Commission's powers to approve under § 5(2) of the Interstate Commerce Act.

Finally, it should be observed that neither *County of Marin* nor *Wood* provides any substantive support to the petitioner's case. In *County of Marin*, this Court held that a "merger" of a single carrier into an inactive corporation which had no assets was not a § 5(2) merger or consolidation. Indeed, in substance, the plan there was not to create one carrier where previously there had been two, but two where there previously had been one; the plan was, in essence, a corporate split-up, not a consolidation. 356 U.S., at 418. Here there is obviously a consolidation between two carriers, the MoPac and the Texas & Pacific. The *Wood* case did not involve consolidation or § 5(2) at all, but, rather, proceedings under the provisions of § 20b of the Interstate Commerce Act for the modification of railroad securities. 49 U.S.C. § 20b.

consolidation. That subsection declares that: "The authority conferred by this section shall be exclusive and plenary," and that carriers participating in a merger or consolidation approved by the Commission under Section 5 are to have "full power . . . to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority. . . ." Moreover, those carriers are declared to be "relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved. . . ."

Except for explicit negations of the applicability of state law, the only reference to state law in Section 5(11) occurs in a parenthetical clause. That parenthetical clause specifies that, in the case of certain described transactions (including a corporate consolidation), the carriers are to consummate the transaction:

> "(with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose). . . ."[5]

[5] It is interesting to observe that the federal law here is so pervasive as to provide for the sort of meeting at which the question may be voted on, and for the question whether special notice of the

The applicability of state law, then, in a rail merger or consolidation, is a narrowly-drawn exception to the general rule of the exclusive and plenary character of federal law. This Court, in *Schwabacher* v. *United States, supra,* made this plain in providing an answer to another very closely related question.[6] This was the question whether state-created rights of dissent and appraisal—commonly provided by state law to stockholders in a merger who object to the merger and follow a specified procedure[7]—could be recognized in the case of a rail merger approved under Section 5 of the Interstate Commerce Act. This Court held that those state-created rights could not be recognized.

The Court stated that the question presented required "consideration of the relative function and authority of Federal and State law in regulating and approving voluntary railroad mergers." In considering this question, the Court provided a "résumé of the history" of the Transportation Act of 1940. It pointed out that:

> "The basic railroad facilities of the United States were constructed under State authorization and restrictions

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proposed action must be included if it is brought before a regular meeting—questions which, in the ordinary case, are regulated entirely by state corporation law provisions. See, *e.g.,* Calif. Corp. Code §§2201(b), 4107; Del. Code Ann., tit. 8, §251(c); Ill. Rev. Stat. c. 32, §157.63; Nev. Rev. Stat. §78.470; N.Y. Bus. Corp. Law §903; Texas Bus. Corp. Act art. 5.03(A).

[6] For the close relationship between class voting and appraisal rights questions, see Gibson, *How Fixed Are Class Shareholder Rights?,* 23 Law & C. Probs. 283, 292 (1958); Lattin, *Minority and Dissenting Shareholders' Rights in Fundamental Changes,* 23 Law & C. Probs. 307 (1958); Note, 72 Harv. L. Rev. 1132 (1959).

[7] See, *e.g.,* Calif. Corp. Code §4123; Del. Code Ann. tit. 8, §262; Ill. Rev. Stat. c. 32, §§157.70, 157.73; Mo. Rev. Stat. §§351.405, 351.455; Nev. Rev. Stat. §78.505; N.Y. Bus. Corp. Law §910; Texas Bus. Corp. Act art. 5.11A(2).

by corporations whose powers and limitations were prescribed by State legislatures, or resulted from limitations on the States themselves. . . . But the stress and strain of World War I brought home to us that the railroads of the country did not function as a really national system of transportation. That crisis also made plain the confusions, inefficiencies, inadequacies and dangers to our national defense and economy flowing from the patchwork railroad pattern that local interests under local law had created." 334 U.S., at 191.

The Court then reviewed the passage of the 1920 Transportation Act, its deficiencies and its replacement by the 1940 Act, which abandoned the "master plan" approach to consolidations of the earlier Act and instead "authorized approval by the Commission of carrier-initiated, voluntary plans of merger or consolidation if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of public interest, justice and reasonableness, in which case they should become effective regardless of State authority." 334 U.S., at 193.

This Court then concisely summarized the requirements imposed by Section 5:

"So reading the legislation relevant to this merger, we find that approval of a voluntary railroad merger which is within the scope of the Act is dependent upon three, and upon only three, considerations: First, a finding that it 'will be consistent with the public interest.' (§ 5(2)(b).) Second, a finding that, subject to any modification made by the Commission, it is 'just and reasonable.' (§ 5(2)(b).) Third, assent of a 'majority,

unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote.' (§ 5(11).) When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority. . . ." 334 U.S., at 194.

The Court commented that "the jurisdiction of the Commission under both § 5 and § 20a[8] is made plenary and exclusive and independent of all other State or Federal authority. § 5(11), § 20a(7)." 334 U.S., at 197. In summary, the Court declared:

"We think it is equally clear that the Commission must look for standards in passing on a voluntary merger only to the Interstate Commerce Act. In matters within its scope it is the supreme law of the land. Its purpose to bring within its scope everything pertaining to the capital structures of such mergers could hardly be made more plain. . . .

"Apart from meeting the test of the public interest, the merger terms, as to stockholders, must be found to be just and reasonable. These terms would be largely meaningless to the stockholders if their interests were ultimately to be settled by reference to provisions of corporate charters and of state laws. Such charters and laws usually have been drawn on assumptions that time and experience have unsettled. . . ." 334 U.S., at 198-99.

It is clear then, from the text of Section 5(11), and, as we will later develop in greater detail, from its legislative

[8] Under which the securities to be issued on the merger must be authorized.

history (pp. 69-81, *infra*) and from the decisions of this Court, that under Section 5(11) the application of State law is an exception, to be narrowly construed so as not to interfere with the dominant federal purpose of facilitating rail unifications.

But here, determinations of questions as to the relative scope of federal and state law are not necessary to decision. There is not involved in this case any provision of state law which expressly requires a class vote upon a consolidation of the sort involved here. What the petitioners, rather, are contending here is that the Articles of Association of MoPac by implication require such a class vote; that there is an "applicable State law" within the meaning of Section 5(11) of the Interstate Commerce Act which purports to give effect to this claimed requirement of the Articles; and that such an "enabling act" provision of state law, as opposed to a state law *requirement* of a particular vote, is the sort of state law provision to which the parenthetical reference in Section 5(11) subordinates the governing standard of federal law. Only after proving all of these propositions—each of which is controversial—would the petitioners encounter the further, final question whether the provisions of Section 5(11) defer in any event to a state provision—mandatory or permissive—for a class vote.

To put the matter a different way, it is necessary for the petitioners to demonstrate in this Court, if the judgment of the Court of Appeals is to be reversed, *each* of five successive propositions:

(1) That the Articles of Association of MoPac, in the first place, purport to require class voting on a consolidation—although the provisions of the Articles of Association which refer to class voting do not even mention merger and consolidation and contain a clause expressly

negating the availability of a class vote in any other circumstances than the ones specified in the Articles. (See point I, pp. 38-47, *infra*)

(2) That, with respect to the consolidation in question, the provisions of the Missouri Business Corporation Law are "applicable State law," despite the fact that MoPac is not incorporated under that law, but under the Railroad Corporation Law, and despite the fact that the Railroad Corporation Law provides a procedure for railroad consolidations.[9] (See point II, pp. 48-56, *infra*)

(3) That, if the Articles do require a class vote, and the Business Corporation Law is "applicable State law," the Business Corporation Law—which plainly does not *require* class voting on a consolidation—nonetheless in fact permits class voting to be voluntarily imposed through charter provisions in the case of a consolidation. (See point III, pp. 56-66, *infra*)

(4) That, if so, Section 5(11) of the Interstate Commerce Act then ordains an incorporation by reference of state law where the state law, instead of expressing a state law *requirement*, simply sets up a "permissive" or an "enabling act" provision permitting a corporation to provide for a particular voluntary vote in its charter. (See point IV, pp. 66-87, *infra*)

(5) That, if so, Section 5(11) is designed to incorporate by reference not only state law requirements for a greater-

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[9] This was the only proposition on which the Court of Appeals agreed with the petitioners. As we shall develop below, this agreement appears to have occurred in part because of a misconception by the Court of Appeals to the effect that under the provisions of Section 5(11) there had to be *some* state statute which could be considered "applicable State law."

than-majority vote[10]—on which its language taken in the natural sense reads—but that it also incorporates state law requirements (including "requirements" by way of charter provisions) for class votes—that is to say, votes not on the basis of the number of "the holders of the shares entitled to vote of the capital stock of such corporation," as specified in the Interstate Commerce Act, but on the basis of separate classes thereof. (See point V, pp. 88-93, *infra*)

Petitioners have urged that on points (1) and (3), the rulings of the District Judge, favorable to them, should be affirmed without inquiry into the merits by this Court, inasmuch as—they claim—those rulings were not reversed by the Court of Appeals. (A-S Br. 26-27, 37; Levin Br. 38) On this basis, they contend that the judgment of the District Court should be reinstated, should this Court agree with them on points (4) and (5).[11]

This approach is manifestly wrong. In the first place, as the Court of Appeals' opinion makes plain, despite a frank indication of the difficulty of the propositions, the Court of Appeals finally held that petitioners did not establish either point (1) or point (3). Said the Court of Appeals:

> "But, while there are significant contrary arguments, we are not persuaded either (a) that either MoPac's

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[10] As the Court of Appeals indeed applied it here, by holding that a two-thirds vote of the stockholders generally was required, in light of the provisions of §351.425 of the Missouri Revised Statutes.

[11] Of course, this Court would also have to agree with them on point (2), our contention that, under a proper interpretation of § 5(11), the Court of Appeals would not have held that the Business Corporation Law was "applicable State law." Despite our express reservation of this point in opposition to certiorari, petitioners have not briefed it.

> Articles call for a class vote on a consolidation [point (1), above], or (b) that, if they do, § 351.270, by its reference to the articles, demands a class vote [point (3), above], or (c) that, even if it does, class voting is something required under applicable State law. In our view, the Class B shareholders must surmount each and all of these hurdles in order to prevail. We are not convinced that they have surmounted any of them." (R. 157)

Moreover, even if there were some doubt as to whether the Court of Appeals had passed on points (1) and (3), the state law questions, it is perfectly clear that it did not approve or agree with the decision of the District Court on these points. We suggest that this Court should not pass on the federal law questions without resolving the state law questions, since that course would involve it in a decision on the federal law points that might be totally unnecessary. But should this Court think it appropriate to pass on the federal law issues in this case without determining the state law points, and should the Court then disagree with our position on the federal law points—points (4) and (5)[12]—the appropriate course, we submit, would be a remand to the Court of Appeals to decide the state law points—if it be assumed, contrary to our contention, that it has not done so. Any other course would deprive respondents of their appeal to the Court of Appeals on these points—points on which the District Court allowed an interlocutory appeal.

This case is unlike the exceptional case of *Steele* v. *General Mills, Inc.*, 329 U.S. 433 (1947), cited by petitioners, where this Court was capable of saying with confi-

[12] And with our position on point (2).

dence that a District Court's decision on an apparently obvious point, "well buttressed by [Texas] state statutes and court decisions" (*id.*, at 439), should be reinstated. The District Judge here, unlike the District Judge in *Steele,* cited no controlling Missouri state cases or other Missouri authorities; indeed, he cited no authorities at all from any jurisdiction whatsoever.[13] Nor could there be said here, in the light of the language quoted above, what was said in *Steele,* that the "Court of Appeals has not disagreed with this holding of the District Court. . . ."—Certainly the Courts of Appeals, who hear appeals daily from their district judges, should have the primary responsibility for determining how far they will accept conclusions by their district judges on issues of state law; the petitioners' suggestion contradicts this sound localization of responsibility in the Courts of Appeals.

The petitioners, despite their contention that the state law issues should be resolved on the basis of the District Court's views, have briefed points (1) and (3). (A-S Br. 29-36; Levin Br. 18-28) We contend that these points should be decided on the basis of the Court of Appeals' resolution of them; but, nonetheless, we shall also brief them. Moreover, in our view, the Court of Appeals' decision as to point (2) turns on a misconstruction of the federal law, and we shall brief that point despite the fact that the District Court and the Court of Appeals apparently resolved it as a matter simply of state law in the

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[13] While we suggest that comparisons as to members of the federal judiciary of the sort essayed by petitioners (A-S Br. 27, n.) are odious, we do invite a comparison of the District Court's *opinion* here (R. 90-98) with the careful analysis of the state law problems by the Court of Appeals. (R. 148-50; 153-55) The District Court's opinion shows no recognition of any federal law problems in this case.

same way. In the absence of a decision in petitioners' favor on points (1), (2) and (3), there would, of course, be no reason to reach the purely federal law issues, points (4) and (5).

We will, accordingly, take up each of the five points in order.[14]

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[14] A threshold argument urged solely by the Levin Brief is that due to a statement which MoPac made in a pleading filed with the Commission in another matter in 1961, it is now precluded from urging that a class vote is not required on the present consolidation. (Levin Br. 29-33) The statement reads as follows:

> "By virtue of the terms and provisions of the Missouri Pacific Railroad Company's Articles of Association the holders of a majority of said Class B stock are given an effective veto power over many vital and important corporate actions including such things as mergers, recapitalizations, stock dividends, stock options, stock rights, equity financing, the issuance of convertible securities, and the use of Missouri Pacific stock for exchange in acquisitions of control." (R. 82-83)

This catalog of corporate actions to which a class vote extended was not submitted in a case in which the issue of the voting rights of the Class A and Class B stockholders was to be directly determined, but in opposition to an attempt by Alleghany Corporation to terminate the voting trust to which its MoPac Class B shares were subject; MoPac opposed that attempt.

Undeniably, there are class voting provisions in MoPac's Articles, and the question is to which transactions they apply. Petitioner Levin would freight the quoted material's reference to "mergers" with significance for the present case, in the process misstating it as if it were a reference to "mergers and consolidations." (Levin Br. 30) But the position that MoPac then took is not inconsistent with its position in the present case, for there could well be *certain "mergers,"* as opposed to "consolidations," where a class vote might be required. (See pp. 44-45, n. 7; p. 47, n. 9, *infra*) A specific example would be a merger with a noncarrier in which MoPac would be the surviving corporation. Such a merger would probably require the issuance of additional shares of MoPac's own stock, and accordingly might require a class vote under the provisions of MoPac's Articles which requires a class vote by MoPac before the issuance of "any shares of stock of the Company of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII." See pp. 8-9, n. 7, *supra*. If such a merger were with a noncarrier, § 5 of the Interstate Commerce Act would not be relevant and the only

I. MO PAC'S ARTICLES OF ASSOCIATION DO NOT PURPORT TO PROVIDE FOR A CLASS VOTE ON THE CONSOLIDATION PROPOSED HERE.

1. The Articles of Association of MoPac provide for a class vote by the Class B Stock in only four specified circumstances. The Articles provide only that, without a class vote of the Class B Stock:

> "The Company shall not . . . . (a) issue any shares of stock of the Company of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII, (b) create or issue any obligation or se-

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referent would be state law. This is scarcely an admission that there is class voting in a rail consolidation where MoPac is not the surviving corporation and where proceedings under § 5(2), which will give rise to the application of § 5(11), are required.

The Levin Brief does not demonstrate how, in any event, the present petitioners relied upon the specific position taken by MoPac in 1961, which reliance is a required element of a so-called "equitable estoppel" (see, *e.g.*, *Pitcairn* v. *American Refrigerator Transit Co.*, 101 F.2d 929, 935 (8th Cir. 1939), *cert. denied*, 308 U.S. 566 (1939)), nor does it suggest how this statement of MoPac, even if it were relevant to the present problem, could operate to divest the Class A stockholders of MoPac of their rights not to have the Class B stockholders vote separately from them, except where the law so requires. It would be an extraordinary holding to suggest that a statement of this sort precluded MoPac from taking advantage of the provisions of Section 5(11) of the federal statute which were designed to effect procedural facilitations in railway mergers and consolidations. The Court of Appeals correctly held that this statement did not estop MoPac. (R. 158) It should also be observed that Alleghany Corporation, the majority holder of the Class B stock, has taken a position which is consistent with MoPac's present position and inconsistent with its own present position. In the proceedings which led to the confirmation of the plan containing the present provision for a class vote on certain limited subjects, Alleghany minimized the effect of the class vote: "Except in the unlikely event that the new company attempts to raise new equity capital or debt capital convertible into equity capital, both of which appear to be

curity of the Company convertible into or exchangeable for shares of stock of the Company of any class, (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock or (d) amend or eliminate any of the provisions of this paragraph (3)." (Article VII, Section D, paragraph (3); R. 13)

The Articles then immediately proceed to make it plain that the requirement of a class vote is the exception, not the rule, and that the ordinary rule is that the Class A and the Class B Stock shall vote together in a general vote with each share to have one vote:

"(4) Except as otherwise provided above in paragraph (3) of this Article VII, or as otherwise required by law, each share of Class A Stock and each share of Class B Stock shall have the same voting power, and the vote of the holders of all or any portion of any class of stock, as a class, shall not be required for any other action whatsoever, to be taken or authorized by the stockholders of the Company, including any amendment to the Articles of Association. . . . "

The parties to the reorganization (who included the predecessors of the Class B stockholders) could readily have provided for a class vote on mergers and consolidations in paragraph (3). The Commission could have ordered such a provision. But no such provision was ordered or included. The Articles of Association are detailed and

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impractical for railroad companies, there would appear to be no veto at all." (R. 81)

The other claim of the Levin Brief (p. 25) of an inconsistent statement by MoPac is a miscitation, even apart from the fact that the point at issue had to do not with MoPac's articles but with the articles of another railroad. The passages cited by petitioner did not represent claims by MoPac but statements and claims made by other parties to the litigation. *Illinois Cent. R. Co.* v. *United States*, N.D. Ill., Aug. 4, 1966, slip opinion, pp. 4, 19-20.

explicit; in the light of this the failure to make express provision for such a class vote should be considered, we submit, the product of conscious choice, and conclusive in itself.

The subject of merger is hardly too recondite a subject for the interested parties to have included. It is hard to imagine any corporate lawyer charged with drafting articles of incorporation where a multiclass stock structure is involved, and where certain class votes are to be provided, not considering the question whether a class vote should be included upon a merger or consolidation. To add a further touch, the sentence which precedes paragraph (3) in the Articles, the final sentence of paragraph (2) dealing with the consequences of liquidation, contains a series of express references to merger and consolidation. This makes even plainer the fact that the decision not to provide a class vote on the question of a merger or a consolidation was a conscious decision. The circumstances of the creation of the two classes of stock in MoPac, developed below and in the Brief of the other Respondents offer one reason for this decision; we outline another at pages 46-47, below.

2. The history of the creation of the Class A and Class B Stock fur[illegible]r confirms the fact that the voting powers of the Class B Stock were to be strictly limited. The Commission's decision in *Missouri Pac. R. Co. Reorganization*, 290 I.C.C. 477 (1954), contains a discussion of the basis on which the Commission authorized the issuance of the Class A and the Class B Stock as MoPac emerged from its lengthy reorganization.[1] Thus, the Commission made it plain that although the Class B stockholders were to have,

[1] The Class A Stock was issuable to the former preferred stockholders of MoPac; the Class B Stock to the former common stock-

in a sense, the ultimate equity in the corporation, the Class A Stock, a large class of stock with a preferential claim on earnings virtually exhausting the then foreseeable earnings of the carrier, was to have "control" of MoPac. (290 I.C.C., at 588, 597) The extent to which the Class B Stock was to be put in a position to avail itself of its equity in the corporation, that is, the extent to which it would be entitled to receive dividends, was clearly left to the discretion of the management (controlled by the Class A Stock) in declaring dividends on the Class B Stock. (290 I.C.C., at 565-66, 597)

Most significantly, the Commission rejected various proposals which would have recognized the old common holders on a share-for-share basis in Class B shares,[2] thereby enormously increasing their vote, and proposals which would have provided for "recognition of them [public holders of the common] as a separate class." The Commission rejected these proposals, stating its conclusion that:

> "The circumstances recited by the Committee do not, in our opinion, justify the recognition of the public holders of the new Class B Stock as a separate class of security holders." (290 I.C.C., at 599)

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holders. This followed a succession of plans of reorganization in which the old common stock was wiped out altogether. See *Missouri Pac. R. Co. Reorganization*, 239 I.C.C. 7, 131 (1940), *approved, In re Missouri Pac. R. Co.*, 39 F.Supp. 436 (E.D. Mo. 1941) (first plan, wiping out preferred and common stock); *In re Missouri Pac. R. Co.*, 64 F.Supp. 64 (E.D. Mo. 1945) (second plan, wiping out preferred and common stock), *aff'd*, 163 F.2d 350, 358 (8th Cir. 1947), *aff'd*, 335 U.S. 211 (1948); *In re Missouri Pac. R. Co.*, 93 F.Supp. 832 (E.D. Mo. 1950) (third plan, wiping out common but giving some value to preferred). It was not until the fourth plan, promulgated by the Commission at 290 I.C.C. 477 (1954), that any sort of value was assigned to the former common stock.

[2] The plan actually approved provided for one Class B share for each twenty shares of the old common.

Indeed, the Commission went so far as to decline even a more modest proposal under which there would have been issued twice the number of Class B shares finally issued, which would thus have vested the Class B Stock with only as much as 4.2% of the voting power of the corporation.[3] Concluded the Commission: "The doubling of the voting power that would result, we believe, would be inequitable." (290 I.C.C., at 599)

There was, thus, the most well-considered of decisions to give the Class B Stock only *de minimis* voting power in MoPac. It seems plain that a class of stock created on this basis—namely, on the basis that it would be inequitable for it to have more than 2.1% of the voting power of the corporation—should not have its voting powers, as defined in the Articles of Association, enlarged by implication to include a class vote on the all-important question of mergers and consolidations—particularly when the Articles expressly negate class voting in situations other than those expressly provided for.

3. Petitioners claim that the consolidation proposed here by implication requires a class vote because the consolidation—it is alleged—does certain things which are tantamount to certain of the matters which are specified in paragraph (3) as requiring a class vote.

(a) The first trouble with this contention is that the Articles do not undertake to require a class vote even upon a merger or consolidation which contains provisions such as, if effected through an amendment to the articles of incorporation, would require a class vote. The inclusion of such a provision would not be an unusual form of draftsmanship: Indeed, this is the approach of the Model

[3] This proposal was to issue one Class B share for each ten of the old common.

Business Corporation Act, Section 67, which provides that: "Any class of shares of any such corporation shall be entitled to vote as a class if the plan of merger or consolidation, as the case may be, contains any provision which, if contained in a proposed amendment to articles of incorporation, would entitle such class of shares to vote as a class." Many states have adopted this approach.[4] This form of limited class vote clause upon mergers and consolidations might readily have been provided for.[5] But once again, the MoPac Articles contain no such provision.

(b) In the second place, the consolidation in question does not in fact do any of the things specified in paragraph (3) as requiring a class vote. The only contentions pursued are that the consolidation, in effect, produces a result of the sort specified in items (a), (c) or (d) of paragraph (3). It does not:

(i) The obvious purpose of a class vote in the cases specified in item (a) is to prevent the existing holders of Class B Stock from having their interests diluted by the issuance either of additional shares of Class A Stock, creating an additional preferential claim,[6] or by additional shares of Class B Stock, which would dilute the position of the present Class B stockholders. But these purposes contemplate the continued existence of the separate classes of stock, Class A and Class B Stock. More-

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[4] See, *e.g.*, Ala. Code, tit. 10, § 21(66); Alaska Rev. Stat. § 10.05.390; Colo. Rev. Stat. § 31-33-3; Ill. Rev. Stat. c. 32, § 157.64; Iowa Code Ann. § 496a.70; Miss. Code Ann. § 5309-151; N.Y. Bus. Corp. Law § 903; Ohio Rev. Code Ann. § 1701.79(B); Texas Bus. Corp. Act art. 5.03B; Va. Code Ann. § 13.1-70.

[5] The Model Act was first promulgated in 1950 and accordingly was available as a source of guidance to draftsmen at the time of the amendment of MoPac's Articles in 1956 which inserted the provisions now in question.

[6] Or by shares of a new class with such a claim.

over, on their face, the provisions in question are only applicable where there are to be issued "shares of stock of the Company"—that is, MoPac, the Missouri corporation. The present consolidation does not contemplate the issuance of any such shares, nor does it contemplate the continued existence, in T&M, the new Delaware corporation, of the separate Class A and Class B stock. Thus, both the letter and the policy of subitem (a) join in indicating that it is not applicable here.—A similar result has been reached by the New Jersey courts, indeed even where the corporation in question was to be the surviving corporation in the merger. *Moss Estate, Inc.* v. *Metal & Thermit Corp.*, 73 N.J. Super. 56, 179 A.2d 54 (Ch. 1962).

(ii) Neither does the proposed consolidation effect the "alter[ation] or change [of] the preferences, qualifications, restrictions and special or relative rights of the Class A Stock or of the Class B Stock" (subitem (c)), or "amend or eliminate any of the provisions of this paragraph (3)." (Subitem (d))—Subitem (c) obviously contemplates a reshuffling of the respective rights of the Class A stock and the Class B stock as they presently exist in "the Company," that is, MoPac. But what is contemplated is not the retention of the classes and the alteration of their rights, nor even the alteration of the present corporate charter of MoPac; what is contemplated is the complete termination of MoPac's present corporate existence and the formation of a new corporation by consolidation, in which the existing classes of stock in MoPac and in Texas & Pacific will be given securities in accordance with a plan which must be found "just and reasonable" by the Commission.[7]

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[7] What would be the result in the case of a merger, as opposed to a consolidation, with MoPac the surviving corporation, is another matter; here, again, the Articles would not expressly provide for

(iii) Subitem (d) is directed to a fairly narrow problem. It is directed to a "two-step" scheme similar to that which was involved in *Sellers* v. *Joseph Bancroft & Son's Co.*, 23 Del. Ch. 13, 2 A.2d 108 (1938). Such a scheme would be first to amend the article requiring class votes by a nonclass vote to delete the class vote requirement and then to do to the Class B Stock, by a nonclass vote, one of the things which the article formerly requiring class votes previously required be done only by a class vote. Such a proposal is not involved here; what is proposed to do is to terminate altogether the present corporate charter of MoPac and consolidate MoPac's properties and those of Texas & Pacific in a new corporation.[8]

In short, then, the matters for which paragraph (3) of Section D of Article VII provides a class vote have to do with the shuffling of interests among the classes of stock of the present MoPac—actions which were described in the court below as "internal" or "intracorporate" changes. (R. 148) They do not touch a situation like the present one

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a class vote on the merger; but, if the agreement of merger also revised the Articles of Incorporation of MoPac as the surviving corporation, there might be some scope for the arguments which petitioners are making; though the case law is against them. See *Moss Estate, Inc.* v. *Metal & Thermit Corp.*, 73 N.J. Super. 56, 179 A.2d 54 (Ch. 1962).

[8] If it is claimed that the consolidation is within the scope of subitem (d) because the provision providing for a class vote, paragraph (3) of paragraph D of Article VII, will terminate, together with the rest of MoPac's Articles, in the consolidation, then the absurd result would follow that every time there is a class vote on any subject provided for in corporate articles of incorporation, together with a protective provision that that class vote may not be eliminated without a class vote, there would also have to be a class vote on a consolidation or a merger where the corporation in question was not the surviving corporation; even though the subject as to which the class vote related had nothing whatsoever to do with consolidation or merger—as indeed the present subject matters of the class vote do not.

where all stockholders are to receive stock in a new corporation on a basis which must be first found "just and reasonable" by the Commission.

4. We submit, then, that the conclusion of the Court of Appeals on this issue, that it had not been shown that there was any requirement in the MoPac Articles for a class vote, was amply supported and is correct. The interpretation of the Articles, in and of themselves, is essentially a question of state law; and, on this point, we would suggest that it is appropriate for this Court, even if there were some doubt as to the matter, to resolve it in accordance with the conclusion of the Court of Appeals. This would be in line with the customary practice of this Court in deferring to the Courts of Appeals on questions of local law. See, *e.g.*, *Richards* v. *United States*, 369 U.S. 1, 16 (1962); *United States* v. *Durham Lumber Co.*, 363 U.S. 522, 526-27 (1960); *Byrd* v. *Blue Ridge Rural Cooperative*, 356 U.S. 525, 529-30 (1958); *General Box Co.* v. *United States*, 351 U.S. 159, 165 (1956); *Propper* v. *Clark*, 337 U.S. 472, 487 (1949); *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707-08 (1949).

There is some suggestion by petitioners that the Court of Appeals was influenced in its view of the interpretation of the Articles, as a matter of state law, by the federal law under Section 5(11) of the Interstate Commerce Act. (A-S Br. 18-22) It is far from clear that the Court of Appeals was (R. 157); but if it was surely this was not improper; nor would it be improper for this Court, if it determines to review *de novo* the meaning of the MoPac Articles, to be so influenced.

This is because the Articles in question are MoPac's Articles, and MoPac is a federally-regulated rail carrier.

Its Articles do not make any express provision for class voting on a merger or consolidation. Yet most mergers or consolidations to which it would be a party[9] would be mergers or consolidations which would be subject to Section 5(11). In such cases, the distribution of securities arising out of the merger or consolidation would have to be found by the Commission to be "just and reasonable"; and the governing federal statute expresses a purpose of facilitating mergers and of minimizing the application of corporate charters. See *Schwabacher* v. *United States, supra,* 334 U.S., at 193-94, 199. Certainly there is no reason to ignore these factors in making a judicial determination (a) whether it is *necessary* to go through the involved process of reading a class vote into the Articles with respect to a merger or consolidation in order to protect the Class B stockholders; and (b) whether it would be *desirable* to do so, and thus give a majority of a tiny class of stock a veto power over transactions which the federal statute is designed to facilitate.—And, as we have suggested,[10] these considerations underscore the fact that the parties' omission of a class vote on mergers or consolidations was deliberate, and that there is no basis for a court to rewrite the Articles in order to provide such a class vote which was consciously and for good reason omitted.

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[9] We must admit, however, not all. Mergers with noncarriers, which are not subject to § 5(2) of the Interstate Commerce Act, are not governed by the procedural requirements of § 5(11). Such a merger might come about as part of a program of diversification on the part of a rail carrier.

[10] See p. 40, *supra.*

II. THE MISSOURI BUSINESS CORPORATION LAW IS NOT "APPLICABLE STATE LAW" TO WHICH SECTION 5(11) DEFERS.

Unless the Missouri Business Corporation Law merger and consolidation provisions are "applicable State law," petitioners' case fails close to its outset, because there would then be no state law which would then give effect to the alleged requirement of the MoPac Articles for a class vote; it is clear that the Railroad Corporation Law contains no such provision. The Court of Appeals held that the provisions of the Business Corporation Law were "applicable State law" to which Section 5(11) of the Interstate Commerce Act made reference. We dispute this holding, because we submit it was reached on the basis of an incorrect major premise as to what constitutes "applicable State law" as referred to in Section 5(11).

The Court of Appeals' opinion makes it plain that it viewed the question before it as an "either . . . or" question. The Court stated "we encounter at once the problem of determining what is 'applicable State law' here. There are several possibilities. . . ." (R. 150) The Court then only discussed the possibilities that (a) the Business Corporation Law or (b) the Railroad Corporation Law might be "applicable State law"; once the court determined that the Railroad Corporation Law did not of itself authorize the consolidation in question, it proceeded to hold that the Business Corporation Law was "applicable State law." (R. 153) The Court of Appeals did not discuss the further possibilities either (c) that there was no "applicable State law" or (d) that the Railroad Corporation Law's consolidation provisions might be "applicable State law" although

they do not, without reference to Section 5(11), authorize the present consolidation.[1]

But the legislative history of Section 5(11), which we review in detail at pages 69-82, *infra*, makes it plain that one of the purposes in the passage of the present form of Section 5(11) was to rectify the situation in which there was no "applicable State law" dealing with mergers and consolidations, or where the "applicable State law" of railroad consolidations did not go far enough and confer appropriate corporate powers on the corporations in question to effect the consolidation.

Thus, for reasons which we will now develop, we submit that had the Court of Appeals borne this fact in mind, it would have determined either (1) that there was no applicable state law, or that (2) the applicable state law was the consolidation provisions of the Railroad Corporation Law, appropriately supplemented by Section 5(11).

1. MoPac is not incorporated under the Business Corporation Law; it is incorporated under the Railroad Corporation Law of Missouri. The Business Corporation Law of Missouri applies to railroad corporations only to the extent of "those provisions of this law [the Business Corporation Law] which supplement the existing laws applicable to railroad corporations . . . and which are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws. . . ." Section 351.690(3), Missouri Revised Statutes. On the basis

[1] For the purposes of argument, we will here assume the correctness of the ruling of the Court of Appeals that the present consolidation could not, because of the limitations in § 388.290, have been effected under the Railroad Corporation Law without reference to § 5(11). But see the Brief for the other respondents, which indicates the contrary.

of their histories, the merger provisions of the Business Corporation Law do not "supplement" the consolidation provisions of the Railroad Corporation Law, and the provisions of the Business Corporation Law are "inconsistent with", in "derogation of", and "in conflict with the purposes of" the Railroad Corporation Law's consolidation provisions.

The reason is that under the statutory scheme in Missouri the cases in which railroads are permitted to consolidate by Missouri law under the Railroad Corporation Law should be considered to be the exclusive cases in which, so far as Missouri law is concerned, consolidations are permissible. Of course, given the provisions of Section 5(11) of the Interstate Commerce Act, that exclusive character of the consolidation provisions of the Railroad Corporation Law is ultimately irrelevant, since rail carriers may freely consolidate, subject to Commission approval, under Section 5(2). Nonetheless, the consolidation provisions of the Railroad Corporation Law remain as indicative of the judgment of the Missouri legislature as to the sort of vote of stockholders to be required where a consolidation was permitted; that vote is a majority nonclass vote; and, we submit, it is to that judgment of the legislature, if to any, that Section 5(11) makes deference in referring to "applicable State law."

2. The first provision of Missouri law permitting a consolidation of railroads was Mo. Laws 1869, p. 75, which was a consolidation act restricted to railroads and quite similar to a portion of the present Section 388.300. At that time, Missouri had no merger or consolidation provisions for ordinary business corporations.

The next year, one day apart, the legislature adopted two more consolidation statutes, one applicable exclusively to railroads, and the other applicable exclusively to other corporations. The first act, restricted to railroads, was the Act of March 24, 1870, Mo. Laws 1870, p. 89. The first section of that act is almost verbatim the same as present Section 388.290, authorizing the consolidation of "end-to-end" carriers. The second section (similar to the act of the preceding year) is essentially the predecessor of present Section 388.300, authorizing consolidations to extend lines from Missouri into other states. The Act of March 25, 1870, Mo. Laws 1870, p. 24, was the first act authorizing the merger and consolidation of general business corporations. It is the predecessor of the merger provisions in present Chapter 351. That legislation was restricted to "corporations organized or created solely for manufacturing purposes."

There was a constitutional backdrop to these statutory provisions. While certain rail mergers were encouraged under Missouri policy, others were expressly forbidden. The 1875 Constitution contained a provision expressly forbidding consolidations of "parallel or competing" railroads. Mo. Const. 1875, Article XII, § 17. The acts on the books permitting rail consolidations in limited cases could well be deemed, together with the constitutional prohibition, to occupy the whole field of rail consolidations. Contemporary thought was to this effect. See *County of Leavenworth* v. *Chicago, R. I. & Pac. R. Co.*, 25 Fed. 219, 225-26 (C.C.W.D. Mo. 1885), *aff'd*, 134 U.S. 688 (1890).[2] The

[2] The Circuit Court there declared (per Mr. Justice Miller, as Circuit Justice) that: "It is the consolidation of such roads as do not form when so consolidated one continuous line, but may be made up of parallel and competing lines, which is forbidden and declared to be void. . . ." 25 Fed., at 225-26. Thus, the provisions

inference is thus plain that there was a distinct public policy of the state against rail consolidations of the sort not permitted by the express provisions of the rail consolidation statutes—a public concern that railroads *not* be permitted to consolidate, except in the cases covered by the Railroad Corporation Law.[3]

The prohibitory provision of the Missouri Constitution was not repealed until 1945. The present Missouri Business Corporation Law was enacted in 1943, at which time the constitutional provision was still on the books.[4]

Clearly, then, in the light of the provisions of the 1875 Constitution, at the time of the enactment of the 1943 Business Corporation Law, it should be apparent that the Railroad Corporation Law furnished the sole "applicable State law" for a rail consolidation. The provisions of Section 351.690(3) would not have been operative to make the Business Corporation Law's provisions "applicable

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in question were considered to "occupy the field" of railroad consolidations; railroad consolidations were either to be considered "end to end," in which case they were permitted under either the predecessor of present § 388.290 or the predecessor of present § 388.300, or they were considered consolidations of parallel lines, in which case they offended Missouri public policy, as set forth in the Constitution, and were prohibited. Thus, the Railroad Corporation Law for close to one hundred years in Missouri has constituted the comprehensive code for rail consolidations.

[3] The text of § 388.290(4), which has been part of the statute since 1870, supports this view that the provisions of the Railroad Corporation Law respecting consolidations are exclusive. That provision declares that "in case any such railroad companies shall consolidate or attempt to consolidate their roads contrary to the provisions of this section, such consolidation shall be void. . . . "

[4] To be sure, this provision could not, after 1940, have had any relevance to consolidations approved under § 5(11). Indeed, it could not have done so after the 1920 Transportation Act, except that it might have been impossible lawfully to have obtained stockholder approval for a consolidation beyond the scope of Chapter 388. See pp. 70-76, *infra*, and specifically p. 74.

State law," because in the light of the negative implications of Missouri's policy of limiting the situations in which rail consolidations could be effected, it could neither be said that the Business Corporation Law merger provisions were "supplementary" to the Railroad Corporation Law in this respect nor that they were "not in conflict with the purposes of those laws."[5]

The last expression of public policy in Missouri, at a time when Missouri law was operative with respect to the power to authorize rail consolidations, was accordingly that rail consolidations were to be limited to the instances specified in Chapter 388, the Railroad Corporation Law. Certainly the passage of the 1940 federal legislation did not make the predecessor of Chapter 351 "applicable State law" with respect to rail mergers, if it had not been so before. Nor can the repeal of the constitutional prohibition against certain specified rail mergers in 1945 have been of any such significance, since at that time that provision was a dead letter in the light of Section 5(11). To say that in 1940, or in 1943, or in 1945, or at some later time, the Business Corporation Law became "applicable State law" under Section 5(11) is impossible. It was not "applicable" in any sense immediately prior to the passage of Section 5(11), and neither the events of 1943, 1945, or any subsequent date changed the picture.[6]

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[5] For additional reasons, see the Brief for the other respondents.

[6] For a more detailed treatment of this, see the Brief for the other respondents. That Brief demonstrates beyond question that the provisions of the predecessors of the Business Corporation Law respecting mergers and consolidations were not applicable to railroad corporations before the passage of the Business Corporation Law; that the Business Corporation Law as passed in 1943 clearly did not apply to mergers and consolidations of railroads; and that certain verbal changes which were made in 1961 were not designed to change this state of affairs.

Indeed, certain provisions of the Missouri Constitution which are still in effect make it plain that the Railroad Corporation Law is intended as the exclusive vehicle for rail consolidations, as far as the state's policy is concerned. Article XI, Section 10, of the Missouri Constitution of 1945, which deals with consolidation of domestic and foreign railroad corporations,[7] declares that: "No consolidation shall take place, except upon at least sixty days' public notice to all stockholders, *in the manner provided by law.*" (emphasis supplied) The consolidation sections of the Railroad Corporation Law provide now—and have always provided—for sixty days' public notice of a stockholders' meeting at which a plan of consolidation is to be voted on.[8] It is clear that only the Railroad Corporation Law in Missouri could be considered "applicable State law" for a rail consolidation in the light of this provision. The Business Corporation Law provision as to notice of mergers and consolidations (Mo. Rev. Stat. § 351.420) requires that notice be given to stockholders in accordance with Section 351.230 of the Revised Statutes. Section 351.230 does not provide for sixty days' notice at all.[9] It is hard, then, to see how the Business Corporation Law could be considered to be "applicable State law" with respect to the proposed rail consolidation; and we submit that only the erroneous approach of the Court of

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[7] The consolidation here contemplated is, of course, a consolidation of a Missouri domestic railroad with a foreign, *i.e.*, a non-Missouri, railroad.

[8] See Mo. Rev. Stat. § 388.290(6); § 388.300(2).

[9] The notice to be given directly to the stockholders is to be given "not less than ten or more than thirty days before the date of the merger." The published notice is to be given at least "ten days prior to the date of the meeting"; the procedural provisions are thus at variance with those contemplated by the Missouri Constitution and implemented by Chapter 388.

Appeals in assuming that under Section 5(11) of the Interstate Commerce Act there had to be *some* "applicable State law" led it to such a conclusion.

3. We submit, then, that in the light of a proper construction of Section 5(11)'s reference to "applicable State law," the Business Corporation Law is not "applicable State law." Either there is no applicable state law—a condition which Section 5(11) clearly contemplates and provides for[10]—or the view should be taken that the Railroad Corporation Law is applicable state law, whether or not it authorizes the transaction in question. That law is the law under which MoPac is incorporated; it describes in detail the procedures for voting on a rail consolidation; its limitations on the sort of consolidations that may be authorized are removed by Section 5(11).[11] Certainly, since

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[10] See our discussion of the legislative history of § 5(11), with its purpose of remedying the deficiencies in state law relating to rail consolidations, pp. 70-76, *infra*.

[11] As the legislative history makes plain, one of the purposes behind the present form of § 5(11) was to remedy deficiencies in the state corporation laws respecting rail consolidations. See pp. 70-76, *infra*. During the two decades between the Transportation Act of 1920 and the Transportation Act of 1940, the point was often made that state laws were inadequate. Chairman Lovett of the Union Pacific made the point graphically in hearings before Congress during this period:

> "If railroad companies must look to the States of their incorporation and the States in which the lines operated by them or to be acquired by them are situated for this essential corporate power [to consolidate], they will find that where it exists at all it varies in terms and conditions and in no event operates beyond the limits of that particular State; in others it exists with perhaps impossible conditions; in still others it is nonexistent; and in some there are positive statutory and even constitutional prohibitions. This not only means many large consolidations impossible (*sic*), but where possible in many cases leaves such doubt or creates such conditions as to meet objections from counsel for bankers sufficient to prevent financ-

the only provisions of state law to which Congress in enacting Section 5(11) chose to defer, even in a limited way, were those prescribing stockholder votes, the uniform judgment of the Missouri legislature that a general majority vote is sufficient to authorize a rail consolidation should be the judgment that is respected under Section 5(11); not the judgment of the legislature in enacting the Business Corporation Law with respect to which there is no evidence that the legislature ever intended application of its merger provisions to railroads, and every evidence that it did not.

Under either approach, the result is the same—a majority vote, taken on a general basis.

III. EVEN IF THE MISSOURI BUSINESS CORPORATION LAW WERE "APPLICABLE STATE LAW," IT WOULD NOT GIVE EFFECT TO THE PROVISIONS OF THE ARTICLES WITH RESPECT TO A CLASS VOTE EVEN ASSUMING THAT MO PAC'S ARTICLES REQUIRED A CLASS VOTE.

Even if we assume that the Missouri Business Corporation Law were "applicable State law" within the meaning of Section 5(11) of the Interstate Commerce Act, the fact remains that that Missouri statute neither requires a class vote on a merger or consolidation nor gives effect to any provision of corporate articles of incorporation which might purport to require a class vote. The Court of Appeals

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ing of securities or impair the price at which they can be sold . . . unless Congress acts, the policy with respect to unification of the railroad properties of the United States will be ineffective in several great sections of the country. . . . " Hearings on H. R. 11212, House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. (1926), p. 73.

so held, as a matter of Missouri law;[1] while we recognize that ordinarily this Court will not look beyond the holding of a Court of Appeals on a state law question (see p. 46, *supra*), we will nonetheless brief the soundness of that holding, should the Court desire to make an exception and look into the question *de novo*.[2]

1. Section 351.425 of the Missouri Revised Statutes is the provision of the Business Corporation Law which relates to consolidations and mergers. It provides that a plan of merger or consolidation "shall be approved upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting, of each of such corporations."[3] No requirement whatsoever of a class vote is imposed.

Missouri law is thus quite different from the law of a number of other states with respect to class voting upon mergers and consolidations. A number of state statutes require a class vote on all mergers and consolidations. See Calif. Corp. Code § 4107; Hawaii Rev. Laws § 173-4; Mass. Gen. Laws Ann. c. 156, § 46(B); Mich. Stat. Ann. § 21.52; Nev. Rev. Stat. § 78.470; N. H. Rev. Stat. § 294:42.

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[1] Stated the Court of Appeals: "We are not prompted to conclude, with any assurance, that the general two-thirds-voting standard embraced by § 351.425 [the merger statute] is qualified by § 351.270 [the enabling act provision] to the extent that it demands class voting if the articles seem to require it." (R. 155)

[2] The brief for the other respondents develops in considerable further detail the soundness of the Court of Appeals' holding on this point as a matter of Missouri law.

[3] Strictly speaking, if the Business Corporation Law is "applicable State law" at all, the relevant provision would be § 351.458 of the Missouri Revised Statutes, which authorizes mergers and consolidations between Missouri corporations and foreign corporations. However, that section provides that with respect to the Missouri corporation or corporations involved, the procedure set forth as to mergers between domestic corporations shall be followed; and so one is referred back to § 351.425, which governs the vote for an all-Missouri merger or consolidation.

Another common provision is that of the Model Business Corporation Act (Section 67, see p. 42, *supra*), which provides for a class vote upon a merger if the "plan of merger or consolidation, as the case may be, contains any provision which, if contained in a proposed amendment to articles of incorporation, would entitle such class of shares to vote as a class." Such a provision is contained in Section 64 of the Illinois Business Corporation Act. Ill. Rev. Stat. c. 32, § 157.64. The Illinois corporation laws and the Missouri corporation laws have a common history, the Illinois law of 1933 having served as the basic model for the Missouri statute. See 17A Vernon's Ann. Mo. Stat., p. iv; Cowherd, *Missouri Modernizes Her Business Corporation Code*, 12 K.C.L. Rev. 89, 92 (1944). The failure of the Missouri statute, then, to make a provision for class voting, is of significance; it underscores the decision of the Missouri legislature not to impose *any* requirement for a class vote upon a merger involving a Missouri business corporation.

2. Since there is no "requirement" of Missouri law, in the ordinary sense, for a class vote on a merger or consolidation, petitioners are, necessarily, thrown back on the "enabling act" provision of the Business Corporation Law, Section 351.270, Missouri Revised Statutes. This provision reads:

> "Whenever with respect to any action to be taken by the stockholders of a corporation the articles of incorporation require the vote or concurrence of the holders of a greater portion of the shares, or of any class or series thereof, than required by this chapter with respect to such action, the provisions of the articles of incorporation shall control this section."[4]

[4] Again, this provision is extracted from the Illinois Business Corporation Act. Section 146 of the Illinois Act, Ill. Rev. Stat.

But this provision leads petitioners nowhere.[5] All it plainly says it that the articles may increase the proportion of votes that is required to carry a general vote of the stockholders, or they may increase the proportion of the vote of a class of stockholders that would otherwise be required *"by this chapter"*; the section does not provide any authority to include a class vote where the statute does not provide for one.[6] Thus, with respect to class voting, the only circumstance where a so-called "voluntary vote" may be injected by the articles is in the case of "the vote or concurrence of the holders of a greater portion . . . of any class or series [of the shares] . . . than required by this chapter with respect to such action." The section on its face only deals with increasing the requisite majority of a class vote which is otherwise provided for by the statute; it does not provide for the inclusion of a sort of vote not otherwise required by the statute.—In the absence of an applicable "enabling act" provision, the rule is that the mandatory, specific statutory requirements as to voting for a particular transaction cannot be changed by the articles of incorporation, in the light of the fact that the state's public policy is as expressed in the statutory pro-

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c. 32, § 157.146, is identical with Missouri § 351.270, except that the Illinois provision does not contain the somewhat mystifying final two words of Missouri § 351.270. The provision in question has been carried forward in the Model Business Corporation Act as § 136, again without the final two words.

[5] Even assuming that, contrary to our contentions in point I, above, it is concluded that MoPac's Articles do require a class vote.

[6] The law generally is to the effect that provisions like § 351.270 are strictly construed. See *Aldridge* v. *Franco Wyoming Oil Co.*, 24 Del. Ch. 349, 14 A.2d 380 (Sup. Ct. 1940); *Standard Power & Light Corp.* v. *Investment Associates*, 51 A.2d 572, 576 (Del. Sup. Ct. 1947); *Benintendi* v. *Kenton Hotel*, 294 N.Y. 112, 60 N.E.2d 829 (1945); 1 O'Neal, *Close Corporations* (1958), §§ 4.19, 4.20, 4.23.

vision. See 2 American Bar Foundation, *Model Business Corporation Act Annotated* (1960), p. 763; Note, *Statutory Assistance for Closely Held Corporations*, 71 Harv. L. Rev. 1498 (1958); *Kaplan* v. *Block*, 183 Va. 327, 31 S.E.2d 893 (1944).

Thus, the section has its application—apart from granting an authority to increase the majority required for a general vote—in situations where, as in the case of a vote upon certain specified amendments to the articles of incorporation (Mo. Rev. Stat. § 351.090) there is a statutory class vote. Thus, with respect to the Illinois version of the "enabling act" provision, since the Illinois merger statute (unlike Missouri's) expressly provides for a class vote on certain mergers and consolidations, the Illinois "enabling act" provision would provide for increasing the majority vote of the class as to those mergers or consolidations where the statute required a class vote. But such a statute does not purport to permit a class vote to be taken in such situations where the law does not require it—and the law unquestionably does not require it in the case of a consolidation or merger in Missouri.

3. In dramatic contrast to the Missouri statute, there are corporation laws in other states which expressly provide for a "voluntary" class vote in situations where the statute does not provide for a class vote in the first place. Thus, Section 48 of the Connecticut Stock Corporation Act (Conn. Gen. Stat. Ann. § 33-329) provides that:

> "Where any other section of this chapter requires for any purpose the vote, consent, waiver or release of the holders of a designated proportion of the voting power or shares, or of the shares of any particular class, such prescribed consent, waiver or release of shareholders, or such prescribed affirmative vote of share-

holders at a meeting duly held at which a quorum is present shall be the act of the shareholders for such purpose; provided in such case the certificate of incorporation may, except where such action is required by such section to be unanimous, provide that for such purpose the vote, consent, waiver or release of the holders of a greater proportion, including all, or a lesser proportion, but, unless expressly permitted by such section, not less than a majority, of the voting power of shares, or of the shares of such particular class, shall be required. *The certificate of incorporation may also, in such case, require any additional vote of other classes or combination thereof.*" (Emphasis supplied.)

Missouri Section 351.270 is only equivalent to the first section of this provision; it does not contain the terms of the second sentence; but it is upon a provision such as the second sentence of the Connecticut statute that the petitioners' case depends.

Other examples of statutes which, unlike the Missouri "enabling act" statute, expressly permit class votes to be injected into a situation where the statute does not otherwise provide for them, may be cited. New York Bus. Corp. Law § 616(2) is equivalent to Missouri Section 351.270; it provides that a corporate certificate of incorporation may contain provisions:

"That the proportion of votes of the holders of shares, or of the holders of shares of any class or series thereof, that shall be necessary at any meeting of shareholders for the transaction of any business . . . shall be greater than the proportion prescribed by this chapter in the absence of such provision."

When this statute was considered in New York prior to its passage in 1961, it was desired to provide for a voluntary class vote, and § 616 was, of course, not deemed to do so, just as Missouri Section 351.270 does not. Accordingly, § 617 was included in the legislation, to provide that:

> "The certificate of incorporation may contain provisions specifying that any class or classes of shares or of any series thereof shall vote as a class in connection with the transaction of any business or of any specified item of business at a meeting of shareholders, including amendments to the certificate of incorporation." [7]

In another approach to supply the concept of a voluntary class vote, not supplied by the Missouri statute, Ohio Rev. Code Ann. § 1701.79(B) provides:

> "In order to be adopted, the agreement [of merger] must receive the affirmative vote of the holders of shares of such constituent corporation entitling them to exercise two-thirds of the voting power of such constituent corporation on such proposal or, if the articles provide or permit, the affirmative vote of a greater or lesser proportion, but not less than a majority, of such voting power, *and such affirmative vote of the holders of shares of any particular class as is re-*

[7] The official commentary on § 617 makes it plain that: "This section is included to recognize that in addition to the class voting required by this chapter, class voting may also be authorized by the certificate of incorporation. . . ." McKinney's Consol. Laws of N.Y. Ann., book 6 (1st vol.), p. 389. Professor Hornstein's semi-official comment states that: "Section 617 permits the certificate of incorporation to provide for voting by classes in connection with the transaction of any business or of any specified item of business at a meeting of shareholders, including amendments to the certificate of incorporation. *Class voting, in other words, may be provided for in situations where it is not required by statute.*" McKin-

> *quired by the articles of such constituent corporation.* In addition, whenever the agreement, if adopted, would have an effect which, if accomplished through an amendment to the articles, would entitle the holders of shares of any particular class to vote as a class on the adoption of such amendment, such agreement . . . in order to be adopted must receive the affirmative vote of the holders of at least two-thirds or, if the articles provide or permit, a greater or lesser proportion, but not less than a majority, of the shares of such class." (Emphasis supplied.)[8]

Thus it is that commentators on Section 136 of the Model Business Corporation Act (substantially similar to Missouri Section 351.270) and its enacted versions in the various states have simply referred to its provisions as providing for "higher percentage requirements," "increased vote or proportion of shares," "greater . . . proportion" votes, and "high votes." See American Bar Foundation, *Model Business Act Annotated* (1960), p. 763; *Comment,* Iowa Code Ann., book 28B, p. 222; Gibson, *The Virginia Corporation Law of 1956,* 42 Va. L. Rev. 445, 463 (1956); 1 O'Neal, *Close Corporations* (1958), §§ 4.01-4.21.

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ney's Consol. Laws of N.Y. Ann., book 6 (2d vol.), p. 454 (emphasis supplied). Thus, it is clear that with a statute which is simply like New York § 616, such as Missouri § 351.270, a class vote may *not* be provided for in situations where it is not required by statute. See also, Revisers' Notes and Comments on Business Corporation Law, Fifth Interim Report, Joint Legislative Committee to Study the Revision of Corporation Laws, N.Y. Legis. Doc. No. 12, 184th Sess. (1961), p. 38 ("in addition to the class voting required by this chapter, class voting may also be authorized by the certificate of incorporation [by reason of Section 617]").

[8] For other similar provisions expressly permitting the injection of a class vote, see Ariz. Rev. Stat. § 10-344; Okla. Stat., tit. 18, § 1.166a(3); Pa. Stat. Ann., tit. 15, § 2852-902(C); Va. Code Ann. §§ 13.1-49(g), 13.1-33.

4. Other provisions of the Missouri Business Corporation Law confirm that class voting, even on a voluntary basis, was never contemplated on a merger or consolidation. Here, again, a comparison of the Illinois and Missouri statutes is of interest. Each of the statutes provides for the filing of a certificate in an appropriate public office upon the approval of a merger or consolidation, which filing makes the merger or consolidation effective. In Illinois, that certificate is to recite, among other things: "as to each corporation, the number of shares outstanding, and, if the shares of any class are entitled to vote as a class, the number of shares and the designation of each such class"; and "as to each corporation, the number of shares voted for and against such plan respectively, and, if the shares of any class are entitled to vote as a class, the number of shares of each such class voted for and against such plan, respectively." Ill. Rev. Stat. c. 32, § 157.65. The corresponding provision in Missouri simply requires that the certificate, in these respects, set forth: "as to each corporation, the number of shares outstanding"; and "as to each corporation, the number of shares voted for and against such plan, respectively." Mo. Rev. Stat. § 351.430.[9] Thus, it is clear that in Missouri, the statute does not contemplate any class vote, either mandatory or voluntarily provided for in the articles, upon a merger or consolidation.[10]

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[9] In the case of a certificate of amendment of the articles, the Missouri Business Corporation Law contains provisions for inclusion of a certificate as to class voting in terms similar to that of the Illinois statute on mergers. Mo. Rev. Stat. § 351.095. This is because the Missouri statute as to amendments, unlike the statute as to mergers and consolidations, provides for class voting in certain cases. Mo. Rev. Stat. § 351.090.

[10] Petitioners suggest that our interpretation ignores the reference to series voting in § 351.270, and point out that there is no express requirement in Chapter 351 for series voting. (Levin Br.

5. Petitioners seek to suggest that there is no reason in policy for a state to authorize charter requirements of extraordinary majorities of the votes of the stockholders taken generally, and not to authorize a voluntary class vote. They have pointed out that if Missouri Section 351.270 were read in accordance with our interpretation (that is, literally), the articles could nonetheless require a unanimous vote on a merger, which would be tantamount to a class vote, since it would require unanimity of the stockholders of each class. Alternatively, the argument is also made, in more conservative terms, that there is no reason for a state statute to permit a 90 or 95% general vote to be imposed through a provision in the articles, while prohibiting the injection of class voting.

Neither version of the argument is, we submit, persuasive. It is one thing for a corporation to provide for an extraordinary majority vote; such a vote has nothing whatsoever to do with a class vote; and because of the inflexibilities that it would create, few corporations except closely held ones would provide for such a vote.[11] Indeed, the authorities suggest that the basic reason for a provision like Missouri Section 351.270 is to be found in the close corporation. (See pp. 79-80, *infra*) It is quite another

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25) But in the case of an amendment to corporate articles of incorporation which simply adversely affects one "series" of a "class", the mandatory class voting provisions of § 351.090, dealing with voting procedure on amendments, presumably would be interpreted as simply requiring a separate vote by the adversely affected series, not by the whole class, even though § 351.090 simply refers to class. Indeed, the Illinois statute, on which the Missouri Business Corporation Law is generally patterned, was amended in 1957 expressly so to provide. Ill. Laws 1957, p. 2192.

[11] For the reasons we develop further in point IV, pp. 66-87, *infra*, such a voluntarily provided vote on a rail merger or consolidation governed by § 5 of the Interstate Commerce Act is not to be recognized by federal law.

thing to provide for a class vote, which vests a veto power over important corporate affairs not in a minority, however small, of the stockholders generally, but in a group of the stockholders having special interests. Such a provision might—if permitted by law—be imposed on a corporation in connection with the creation of a minority class where the interests involved would never have considered imposing a 90% or a 95% or a 100% general vote rule on major corporate changes. Simply because such a statute as Missouri Section 351.270 is enacted by a legislature to provide for extraordinary majority requirements, essentially with the case of the close corporation in mind, it does not follow that the legislature would have adopted a provision for the injection of class votes in situations where the legislature did not itself impose any requirement for class voting. Such voluntary class votes, if permitted, might well be injected into the charters of publicly-held corporations to make more difficult transactions, such as mergers and consolidations, which the legislature determined to foster.

IV. SECTION 5(11) OF THE INTERSTATE COMMERCE ACT INCORPORATES BY REFERENCE ONLY STATE LAW VOTING REQUIREMENTS WHICH ARE IMPOSED AS A MATTER OF MANDATORY STATE POLICY; IT DOES NOT INCORPORATE BY REFERENCE VOTES PROVIDED FOR IN CORPORATE ARTICLES OF INCORPORATION AND GIVEN EFFECT TO BY A STATE STATUTE OF AN "ENABLING ACT" NATURE.

1. At this point, we will assume for the sake of argument that the MoPac Articles of Incorporation do purport to require a class vote on the proposed consolidation; that the Missouri Business Corporation Law is "applicable State law"; and that despite its language, Section 351.270, the "enabling act" provision of the Missouri Business Corporation Law, gives effect to charter requirements not only

(a) of an increased majority general vote and (b) of an increased majority of a class where the statute otherwise provides for a class vote, but also (c) for the injection of class votes into situations where none is otherwise provided for by law. Nonetheless, as the Court of Appeals correctly held, it is plain that petitioners' case must fail. The reason is that the provisions of the controlling federal law here defer only to mandatory voting requirements imposed by state law, not to voting requirements that are set forth in corporate charters in a state that has an "enabling act" provision like Section 351.270, which writes a "blank check" for such charter provisions.[1]

At this point, it is important to realize the thrust of the petitioners' argument on this point. Provisions such as Section 351.270 of the Missouri Revised Statutes are now fairly common in state corporation statutes,[2] though they

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[1] The Brief in No. 352 attempts to obscure the issue by stating that: "Charter provisions governing stockholder voting are rarely, if ever, themselves *required* under State law. . . . " (Levin Br. 26 n. 19; emphasis original). The point is, rather, that virtually every state general corporation or railroad corporation law which provides for mergers and consolidations requires a certain vote of the stockholders to approve such mergers or consolidations. This is the obvious and natural meaning of the reference to a vote which is "required under applicable State law."

[2] The provision in question is substantially in the language of § 136 of the Model Business Corporation Act. *Cf.* 1 O'Neal, *Close Corporations* (1958), § 4.15. Section 136 is in effect as Ark. Stat. § 64-222; Miss. Code Ann. § 5309-301; Neb. Rev. Stat. § 21-20, 128; S.D. Bus. Corp. Act § 131; Utah Code Ann. § 16-10-136; Wash. Rev. Code, tit. 23, § 154 (effective July 1, 1967); and Wyo. Stat., tit. 17, § 36.119. In addition, substantially similar provisions are in effect as Ala. Code, tit. 10, § 21(4)10; Alaska Rev. Stat. § 10.05.801; Colo. Rev. Stat. § 31-4-18; Del. Code Ann., tit. 8, § 102(b)(4); Ill. Rev. Stat. c. 32, § 157.146; Iowa Code Ann. § 496a.138; Kan. Gen. Stat. Ann. § 17-2803(G); Mass. Gen. Laws, Ann. c. 156B, § 8; N.C. Gen. Stat. § 55-66; N.D. Rev. Code § 10-19-34; Ore. Rev. Stat. § 57.686; Texas Bus. Corp. Act art. 9.08; and Wisc. Stat. Ann. § 180.90. Moreover, corporation stat-

were not in 1940. If petitioners are correct in their contentions, the general standard of Section 5(11) must bow to any charter of a railroad, incorporated in one of these states, which provides for an extraordinary vote of the stockholders—say, three-fourths or four-fifths or nine-tenths—in order to assent to a merger or a consolidation. And this is the case notwithstanding that there is no general state policy in the state in question requiring such an extraordinary vote on a merger or consolidation, and notwithstanding the dominant purpose of the federal statute to encourage railroad unifications in the forms of merger and consolidation.

This is an extraordinary contention, and one whose acceptance would tend to negate the federal policy expressed in Section 5, which is "to facilitate merger and consolidation in the national transportation system." *County of Marin* v. *United States, supra,* 356 U.S., at 416. The authorities we have reviewed above, pp. 26-31, demonstrate the overriding purpose of Congress in enacting the Transportation Act of 1940, "with its sweeping revision of § 5" of promoting rail mergers and consolidations. As this Court declared in *Schwabacher* v. *United States, supra,* 334 U.S., at 198: "In matters within its scope it [the merger and consolidation provision of the Interstate Commerce Act] is the supreme law of the land. Its purpose to bring within its scope everything pertaining to the capital structures of such mergers could hardly be made more plain." Part and parcel of this approach is Section 5(11)'s provision of an "exclusive and plenary" federal procedure for carrying out those mergers and consolidations, in which

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utes of other states provide more expanded versions of the Model Business Corporation Act "enabling act" provision, expressly authorizing the injection of class votes in situations where the corporation statutes do not require them. See pp. 60-63, *supra.*

the operation of state law was a narrowly drawn exception. The federal statute sets up the standard of assent by a "majority . . . of the votes of the holders of the shares entitled to vote." (Section 5(11)) The only exception is where "a different vote *is required under applicable State law,* in which case the number *so required* shall assent." (emphasis supplied)

As the Court of Appeals held (R. 155-57), on its face the federal act's language looks to state law *requirements,* not simply to votes *permitted* under state law. A class vote of the sort contended for here is one required not by the Missouri statute, but (allegedly) by the articles (allegedly) as permitted by the Missouri statute.[3] Certainly the policy of the federal act, as well as the natural thrust of its language, favors an interpretation which would restrict the situations where a vote greater than the basic federal standard is to be required to those where the state law has chosen to impose a positive requirement; not an interpretation which would displace the federal standard in those cases where the state law indifferently makes lawful whatever requirements the private parties include in corporate charters.

2. The specifics of the background of the Transportation Act of 1940 strongly support this view. Under Section 5 of the Interstate Commerce Act as originally provided for

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[3] The new New York Business Corporation Law makes this distinction very well. It characterizes the statutory votes as votes "required by this chapter"; voluntary votes given effect by the "enabling act" provisions of §§ 616 and 617 are characterized as votes "required . . . by the certificate of incorporation as permitted by this chapter." Thus, referring to a voluntary class vote included in articles under the statute's express "enabling act," § 617, providing for voluntary class votes (see p. 62, *supra*), the statute declares that: "Such voting by class shall be in addition to any other vote, including vote by class, required by this chapter and by the certificate of incorporation as permitted by this chapter." (§ 617(c))

in the Transportation Act of 1920, it was provided that railroads might consolidate, upon a favorable order by the Commission, "if all the carriers involved assent thereto." (Former Section 5(6)(c), as in effect under the Transportation Act of 1920, 41 Stat. 482.) This language was generally interpreted as requiring a reference back to the corporate charter and the state law as to the method in which the "assent" of the carriers was to be manifested.

The principal historian of the experience under the 1920 Act has written of "the general miscarriage of planned consolidation during the twenty years of its trial." Leonard, *Railroad Consolidation Under the Transportation Act of 1920* (1946), p. 12. While criticism of the 1920 Act took place on a number of counts, one of the felt deficiencies was the lack of specificity in the statute as to the methods and procedures of railroad consolidation; and specific criticism came with respect to the problem of minority obstruction of desirable unifications. Thus, it was observed that:

> "In several important instances, unifications had been tied up in litigation for months and years when minority groups insisted on better treatment and higher prices for their holdings." Leonard, *supra,* at 179.

It was also observed that, under the 1920 Act, the Commission

> "could not compel dissident groups to get together and iron out their differences. It had no power and could confer no power upon a majority of security holders to condemn the interests of troublesome minorities." Leonard, *supra,* at 268.

Accordingly, among the felt deficiencies of the 1920 Act was its complete deference to state law on the question of

corporate approval of rail mergers and consolidations—a deference which permitted "troublesome minorities" to have a veto power over those transactions. Therefore, commencing in the late 1920's, a number of bills were introduced in Congress to provide a federal consolidation statute laying down detailed procedures for the accomplishment of railroad unifications and specifically dealing with matters such as shareholders' votes. These proposals are the lineal ancestors of Section 5(11) as added by the Transportation Act of 1940. See S. 1870, 69th Cong., 1st Sess. (1925); H. R. 11212, 69th Cong., 1st Sess. (1926); S. 3840, 69th Cong., 1st Sess. (1926); S. 4892, 69th Cong., 2d Sess. (1926); S. 1175, 70th Cong., 1st Sess. (1927); H. R. 5641, 70th Cong., 1st Sess. (1927); H. R. 12620, 70th Cong., 1st Sess. (1928); S. 5817, 70th Cong., 2d Sess. (1929).

An ICC Commissioner, Commissioner Henry C. Hall, appeared in support of one of these proposals (S. 1175, 70th Cong., 1st Sess. (1927)) and stated that the proposal resulted from "the lack of provision for Federal machinery in the corporate operations of these various existing carriers to bring about what it was plainly desired by the statute [the 1920 Act] to facilitate; that is to say, the further unification." (Hearings on S. 1175 before Senate Committee on Interstate Commerce, 70th Cong., 1st Sess. (1928), p. 31.)

At this time, Senator Fess, who had introduced S. 4892, 69th Cong., 2d Sess. (1926), a bill providing for a federal standard of a general two-thirds vote on consolidations and mergers, and who was an active proponent of this type of legislation, noted that it was a means of avoiding compulsory consolidation of the railroads, and that it provided both the assurance of majority rule within the carriers and protection of minority interests. *Id.*, at 217.

During the hearings on the bill which became the Emergency Transportation Act of 1933,[4] a railroad spokesman bitterly criticized the then current Section 5(6) of the Act as not providing proper machinery for consolidation:

> "Congress gave instructions to the Interstate Commerce Commission to construct a foundation upon which should be built the superstructure of the consolidation of railroads, and then gave them no tools, no materials, no machinery to use in the buildings of such a structure. . . . what kind of consolidation agreement? With whom would it be filed? What terms and conditions? What consent of stockholders? You have not given them any machinery; you have not given them any statutory rule." Hearings on H. R. 9059 before House Committee on Interstate and Foreign Commerce, 72d Cong., 1st Sess. (1932), pp. 217, 222.

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[4] The Emergency Transportation Act of 1933 (48 Stat. 210), however, did not revise the approach of former Section 5(6), which was interpreted as deferring entirely to state law and corporate charters in determining the procedure for the adoption of plans of rail consolidation or merger. Indeed, Section 5(4) of the Act, as amended by the 1933 Act (which was the provision corresponding to Section 5(6) under the 1920 Act), deleted any reference whatsoever to the method in which the carriers involved in the merger or consolidation were to assent thereto as a corporate matter. 48 Stat. 217. The basic reform made by the 1933 Act was to bring indirect methods of unification, primarily through the use of holding company structures, under the terms of Section 5, and require Commission approval for them. See S. Rep. No. 87, on S. 1580, 73rd Cong., 1st Sess. (1933), pp. 8-11; H.R. Rep. No. 16, 73rd Cong., 1st Sess. (1933), pp. 2, 5-7. See also *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151 (1957). By thus bringing all methods of rail unification under federal substantive control, by subjecting them to Commission approval, the 1933 Act was a further step in the federalization of the law of rail unifications, and as such furnishes part of the background of the 1940 Act. See *Texas* v. *United States*, 292 U.S. 522 (1934), holding that a lease provision approved by the Commission under § 5, as amended by the 1933 Act, took precedence over a provision of the Texas statutes.

Thus, by the early Thirties there was a consensus that one of the marked deficiencies of the 1920 Act was its failure to provide a federal procedure for obtaining the assent of rail carriers to unification proposals, and there was also a body of proposals to rectify this deficiency by providing for a uniform federal standard that would permit majority rule to be effective.

The immediate context of the 1940 Act is furnished by two reports, one by the so-called "Committee of Three," consisting of three ICC Commissioners, and the second by the "Committee of Six," composed of three representatives of railway management and three of railway labor. The Committee of Six Report, which took a considerably different approach from that of the Committee of Three, has been regarded by this Court as part of the authoritative legislative history of the 1940 Act. Report of Committee Appointed September 20, 1938, by the President of the United States to Submit Recommendations Upon the General Transportation Situation (1938). See *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 318-19 (1954). It strongly supported a policy in favor of fostering rail consolidations, finding that "further railroad consolidations may be effected in many cases with great public benefit." Report, at 31.

A bill incorporating the Committee of Six recommendations was prepared by a joint drafting group of railroad management and union lawyers. Hearings on H. R. 2531 before House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess. (1939), pp. 181, 312, 314. Section 48 of this bill contained suggested revisions of Section 5 of the Interstate Commerce Act; Section 48(10) of the group's bill is virtually the same as Section 5(11) of the statute; the group's proposal was used as the

basis for the preparation of S. 2009, 76th Cong., 1st Sess. (1939), introduced by Senator Wheeler, which, with certain amendments not here material, finally became the Transportation Act of 1940. See *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co., supra,* 347 U.S., at 319.

In the course of committee consideration of the legislation, R. V. Fletcher, General Counsel of the Association of American Railroads, and one of the draftsmen of the joint group that had drafted the bill to implement the report of the Committee of Six, thus explained before the House Committee the terms of Section 5(11) [Section 48(10) of the group's draft]:

> "I think that the practical result would be to promote consolidations if the railroads were freed from the restrictions that I have mentioned—standards in the act—which have proven to be impracticable. [He here referred to the changes in Section 5(2).] This would be true particularly, if you enact another provision here which I had not reached in my discussion, but which I will now mention, namely the provisions found in subsection 10 [of Section 48] of this draft that I have handed to the committee. On page 6, it is proposed that 'the authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission under the authority conferred by said section, shall have full corporate power' to carry such transaction into effect, go on and consummate the transaction. That is a very useful provision, because sometimes even now after you get the consent of the Interstate Commerce Commission you are restricted by the limitations placed upon you by State laws where you are incor-

porated, the laws of the State under which you are operating or by provisions of your own charter which have been granted in some cases by the legislature.

"I do not mean now, Mr. Chairman, to say that under present law you are not freed from the restrictions of the State laws of the anti-trust type, but I am talking about corporate power. The purpose of this section here is to have the Congress confer corporate power upon the railroads to consummate the plan which the Interstate Commerce Commission has approved.

* * *

"The Chairman [Mr. Lea]: Well, that would eliminate any restriction in an action of that kind that a State law might impose.

"Mr. Fletcher: It would if that State law restriction stood in the way of carrying out the consolidation which the Commission had approved.

* * *

"I certainly think that there would be a very great renewal of activity in the matter of consolidation if the law were amended." House Hearings, *supra*, pp. 682-83.

And before the Senate Committee, Fletcher explained the provision as follows:

"The purpose of that, Mr. Chairman, is to give to the Interstate Commerce Commission the power to enlarge the corporate power of the carrier if that is necessary to accomplish the particular consolidation. Instances have arisen in which the charter of the railroad granted by the State, or under some State law, would prohibit the doing of the thing which the Inter-

state Commerce Commission finds to be in the public interest, not merely because of the operation of anti-trust laws or antimonopoly statutes—that is taken care of in another place—but because there is a lack of corporate power in the carrier, functioning as it does under authority granted by the State law, to accomplish the things that are there sought.

"Section 11 undertakes to supply that deficiency by having the Congress, acting through the Interstate Commerce Commission, bestow upon the carrier corporate power to accomplish the thing which is there thought [*sic*] to be carried out.

* * *

"The Chairman [Senator Wheeler]: There is no question that in some instances the transportation system of the United States has been handicapped by some of the provisions of State laws." Hearings on S. 1310, S. 2016, S. 1869 and S. 2009 before the Senate Committee on Interstate Commerce, 76th Cong., 1st Sess. (1939), pp. 114-15.

With this explanation, the present Section 5(11) came into the statute.[5] Its sweep and thrust are unmistakable. It vests an authority which is declared to be "exclusive and plenary"; it confirms that participants in the transaction are to have "full power . . . to carry such transaction into effect . . . without invoking any approval under State

[5] An alternative form of this legislation, which Congress rejected, was based on the recommendations of the Committee of Three, and was introduced by Congressman Lea. H.R. 2531, 76th Cong., 1st Sess. (1939). This legislation simply removed the "master plan" requirement from the law. It did not federalize the law of railroad mergers and consolidations as did Senator Wheeler's bill, based on the work of the drafting committee which implemented the recommendations of the Committee of Six. This conscious choice of Congress to federalize the railroad consolidation laws underscores the interpretation we urge for Section 5(11).

authority"; it declares that all persons are "relieved from the operation of . . . all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved." And the statute declares that the "power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State." For the first time it provided what had been sought for two decades—a federal standard of how assent to a rail consolidation was to be signified.

3. Against this backdrop, the contention of petitioners amounts to a turning of the clock back in the direction of the 1920 Act. The whole history of the statute shows a purpose of moving away from particularized, individual requirements of state law and corporate charters which tended to frustrate merger and consolidation, and toward a more uniform, federal standard. As this Court put it in *Schwabacher* v. *United States, supra,* 334 U.S., at 199, in rejecting a similar proposal that the interests of stockholders "be settled by reference to provisions of corporate charters and of state laws": the thrust of the federal legislation is that "such charters and laws usually have been drawn on assumptions that time and experience have unsettled. . . ."

To be sure, Congress created an exception from the general principle of rule by a general majority of the stockholders by its deference to cases where "a different vote is required under applicable State law, in which case the number so required shall assent." But the general stockholder voting *requirements* imposed on a mandatory basis by state law upon consolidations are not, generally speak-

ing, unduly burdensome; the usual provision is for a majority or a two-thirds vote; indeed, in terms of the "general corporation" laws of the states,[6] only Hawaii with a three-fourths requirement, and Texas with a four-fifths, stand alone in requiring more than a two-thirds vote. Hawaii Rev. Laws § 173-4; Texas Bus. Corp. Act art. 5.03. The voting requirements of the consolidation provisions of state "railroad corporation" laws are likewise not onerous, usually providing a majority or a two-thirds vote.[7] What the federal statute seems to have provided by this reference to state law, then, is a compromise between the draft bills of the Twenties and Thirties which provided for a federal majority vote standard and those which provided for a federal two-thirds vote standard.[8] The compromise was

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[6] It must be remembered that only if the Missouri General and Business Corporation Law is here deemed applicable does the Court even have to reach this point. See pp. 48-56, *supra*.

[7] See, *e.g.*, Md. Rev. Stat. § 23-207 (majority); Tenn. Code Ann. § 65-910 (majority); Wisc. Stat. Ann. § 190.06 (majority); Ill. Rev. Stat. c. 114, § 39 (two-thirds); N.J. Rev. Stat. § 48:12-129 (two-thirds); Ohio Rev. Code Ann. § 4967.04 (two-thirds). Only three states require more than a two-thirds vote. Iowa Code Ann. § 476.4 (three-fourths); N.M. Stat. Ann. § 69-2-2 (three-fourths); Wash. Rev. Code § 81.36.070 (three-fourths). The basic problem with these railroad corporation consolidation statutes is not their voting standard, but that they frequently do not authorize consolidations where federal policy would authorize them, and they frequently do not provide adequate corporate powers to the consolidated corporation.

[8] From the earliest days of the proposal of a federal voting standard, there were rival proposals of a two-thirds general vote and of a majority general vote. See S. 1175, 70th Cong., 1st Sess. (1927), § 208(3) (two-thirds); Hearings on S. 1175 before Senate Committee on Interstate Commerce, 70th Cong., 1st Sess. (1928), p. 12 (alternative proposal of railroad management for majority vote); S. 5817, 70th Cong., 2d Sess. (1929), as reported by Committee in S. Rep. No. 1884, 70th Cong., 2d Sess. (1929), p. 21 (majority vote standard). At this time, the question whether there should be a majority general vote standard or a two-thirds general vote stand-

that a majority would suffice except where the state law required a greater number, characteristically two-thirds.

But if Section 5(11) is viewed as incorporating not simply the general *requirements* of "applicable State law," but the provisions of corporate charters in the now rather large number of states that have "enabling act" provisions, the

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ard was the subject of considerable discussion. The railroad proposal that there be simply a majority vote standard was the subject of a colloquy with Senator Wheeler in the hearings:

"SENATOR WHEELER: Might that not be in conflict with some of the State laws with reference to consolidation of companies? Some of the State laws require two-thirds, do they not, of the stock?

"MR. THOM [counsel for the railroads]: It may be, but this Federal procedure is under our theory, and I think under the theory of Senator Cummins, to stand by itself, Senator."

(Hearings on S. 1870, Senate Committee on Interstate Commerce, 69th Cong., 1st Sess. (1926), p. 194)

Senator Wheeler then asked if "we want to grant a bare majority of the stockholders" this right, or "whether it ought not to take two-thirds." *Id.*, at 195.

This colloquy then followed:

"SENATOR WHEELER: The thought occurred to me that a good many States provide that you cannot transfer the property of any corporation unless you have a two-thirds majority of the stockholders in favor thereof. That is found in the laws of a good many of the States.

"SENATOR PITTMAN: I may suggest that that is for the protection of the minority stockholders, but in this case the minority stockholders have the protection of the Interstate Commerce Commission under the policy laid down in this Act."

(*Id.*, at 196)

These bills for a fixed federal voting standard, unaffected by state law, continued into the 1930's. See S. 6276, 71st Cong., 3d Sess. (1931), § 208(3) (majority vote).

It may well have been in a desire to avoid a diversionary battle on whether a simple majority or a two-thirds majority should be the governing federal standard that the Act was drafted to provide for a compromise, with a basic standard of a majority general vote, with the number of shareholders who must assent to be increased where the state law so required.

increased obstacles to merger and consolidation in the national rail system that can result are immeasurable. The purposes of provisions such as Missouri Section 351.270 are totally antithetical to that of the purpose of the federal statute. It is recognized that the primary intended beneficiary of such provisions is the close corporation, or "incorporated partnership." Such provisions are "peculiarly for use by a close corporation." American Bar Foundation, *Model Business Corporation Act Annotated* (1960), p. 763 (Comment to § 136, ¶ 4). See also Comment, Iowa Code Ann., book 28B, p. 222; *Illinois Business Corporation Act Annotated* (1966 pocket part), pp. 162-63 ("facilities for control of the close corporation"); Hornstein, Analysis of [N.Y.] Business Corporation Law, McKinney's Consol. Laws of N.Y. Ann., book 6 (vol. 2), p. 454 ("give[s] affirmative sanction to practices familiar in the 'incorporated partnership' "); *cf.* 1 O'Neal, *Close Corporations* (1958), §§ 4.15, 4.18, 4.21.[9] These provisions are designed to give effect to corporate charter requirements of votes as high as 100% unanimity on corporate actions. See "Comment of Bar Committee," Vernon's Annotated Texas Statutes, Bus. Corp. Act art. 9.08. They are designed to "give a minority a more easily exercised power of veto over proposed action." Comment, Iowa Code Ann. tit. 19, p. 222.

This purpose is completely antithetical to the purpose of Section 5 of the Interstate Commerce Act. That purpose

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[9] Indeed, Professor O'Neal's discussion of "high vote requirements" in corporate charters makes it plain that their consistency with public policy is restricted to closely held corporations. "It is difficult to see a public interest in the control arrangements of close corporations." 1 O'Neal, *Close Corporations, supra,* at § 4.21. "Refusal to allow deviation from the statutory scheme of majority control may be desirable for public-issue corporations where the ability to reach effective corporate decision would be blocked by giving to large numbers of directors and shareholders an individual power to veto." Note, 62 Harv. L. Rev. 526, 527 (1949).

is not to "give a minority a more easily exercised power of veto"; opposition by minorities was one of the factors which made consolidation under the 1920 Transportation Act unworkable. See pp. 70-71, *supra*. Under Section 5 of the Interstate Commerce Act, minorities are protected not by giving them a power of veto over proposed mergers, but by vesting in the Commission the plenary power and duty to see to it that the terms of the merger or consolidation are "just and reasonable" to all classes of security holders of all the corporations participating in the transaction.

Moreover, statutes of the "enabling act" variety, such as Missouri Rev. Stat. Section 351.270, were quite uncommon at the time of the consideration of the Transportation Act of 1940 in 1939 and of its passage in 1940. Only a handful of states had such provisions.[10] Statutes of this kind did not become common until the promulgation of the Model Business Corporation Act in 1950. There is no indication in the legislative history that Congress had them in mind when it legislated. This historical consideration supports the literal reading of Section 5(11) as extending only to votes which are imposed as *requirements* by a mandatory provision of state law.

Recognition of the vagaries of individual railroad charters in respect of voting upon mergers, simply because of a state "enabling act" statute which writes a "blank check" for corporate charter voting requirements, would frustrate the principle of majority rule with respect to mergers and consolidations of rail carriers of which this Court's opinion in *Schwabacher* v. *United States, supra,*

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[10] We have found only four state corporation law provisions of the "enabling act" variety in effect in 1940. These are former Del. Rev. Code (1935), § 2037; Ill. Rev. Stat. c. 32, § 157.146; Md. Corp. Code § 5; and former Ohio Gen. Code § 8623-49.

is an expression. It would unduly expand the narrow recognition given to state law requirements by Section 5(11)—a recognition which the legislative history overwhelmingly demonstrates is the exception and not the rule—to hold that Section 5(11) incorporates by reference not only the general requirements of state law, but the particularized requirements of corporate charters, in those states where there happens to be an "enabling act" provision.

The state's general mandatory requirement for voting on a merger or consolidation may be expected to reflect its general judgment as to a sound overall public policy. Its further adoption of an "enabling act" statute generally will simply reflect its further judgment that in the ordinary case, the internal affairs of a corporation, particularly a closely held one, are not so affected with a public interest as to preclude the various private ownership interests in the corporation from ordering their affairs in virtually any way they see fit. But that second judgment is one which is antithetical to the federal policy of fostering mergers and consolidations of interstate rail carriers. In sum, it is one thing for federal law to make deference to requirements which the state legislatures have seen fit to require generally of their corporations; it is quite another to say that federal law was designed to incorporate by reference, where state law permits it, the individual charters of railway corporations,[11] often antique and outmoded, and to

[11] Often, railroad corporations may not be incorporated under a state's general corporation law, and they are instead incorporated under other provisions of the state's code. See, *e.g.*, Conn. Gen. Stat. Rev. § 33-286; Ill. Rev. Stat. c. 32, § 157.3; Mich. Comp. Laws § 450.3; Texas Bus. Corp. Act art. 2.01(4)(e) (general statutes not available); Ill. Rev. Stat. c. 114, § 1; Mich. Stat. Ann. § 22.201; N. Y. Railroad Law § 5; Texas Rev. Civil Stat. art. 6259 (special provisions). Many railroad corporations have special charters granted, often at a now remote date, under special legislation. Elliott, *Railroads* (3d ed. 1921), § 22, p. 39; 1 Fletcher, *Cyclopaedia Corporations* (1963), § 148.

force protracted judicial inquiries—of the sort which petitioners are attempting here—into their meaning.

4. Petitioners urge that certain regulations of the Commission indicate a practical construction of the statute to the effect that class voting or other special voting requirements specified in corporate charters are to be recognized in rail mergers and consolidations passed on by the Commission under Section 5 of the Interstate Commerce Act. (Levin Br. 27; A-S Br. 24) The regulation relied on is, literally, a list of the exhibits which is to be filed in connection with the various applications to be filed with the Commission under Section 5(2).—An exhibit list seems hardly a likely place for the Commission to promulgate a significant interpretation of the meaning of Section 5(11) of the Act. But in any event, the list requires that there be filed:

> "As Exhibit 1, a copy of all resolutions of directors of each applicant and of each carrier which is a party to the transaction, authenticated by a proper executive officer, authorizing the proposed transaction and, where applicable, the making of the application to the Commission for its approval and authorization; and, if the charter or by-laws of the applicant or carrier require approval of the stockholders, a copy of the resolution of stockholders authorizing the proposed transaction and the making of the application. . . ."

The exhibit also is to include the "number of shares entitled to vote, the number of shares voted for and against the resolutions, and the number of share-votes required to adopt the resolution." (49 C.F.R. § 52.3(b)(1))

This item in the exhibit list, of course, makes no reference whatsoever to class voting, or even to the possibility

of class voting. If it were to be given any substantive significance at all, accordingly, it would ultimately favor our position. But clearly it has no substantive significance. The Commission's regulations do not purport to give it any. Manifestly, if they did, the implication which petitioners would seek to draw would be contrary to the statute. Indeed, if the exhibit list were taken as a substantive indication of the Commission's views rather than as a clerical compilation, it would suggest that the Commission generally thought that it was still operating under the 1920 Act; for example, the description of Exhibit 1 states that there must be a stockholders' resolution only "if the charter or by-laws of the applicant or carrier require approval of the stockholders." Nothing at all is said about the requirements of Section 5(11) of the federal law, which, after the 1940 Act was passed, affirmatively required stockholder assent to purchases and sales, leases, consolidations, and mergers, whether or not any other authority conceivably did or could require them.

There are other respects in which the substantive implications which petitioners would draw from this Exhibit flatly contradict the statute. Petitioners in No. 359 point out, in order to show the contemporaneity of the exhibit list, that it was "promulgated the same year that § 5(11) was enacted." (A-S Br. 24) In another place the petitioners forget themselves to the point of stating that "the rarity of the lack of a state standard *today* is attested by the ICC's Rule 52.3" (A-S Br. 20; emphasis supplied), pointing out that the Rule does not make any reference whatsoever to the required federal standard of a majority general vote. In other words, of course, the exhibit list when promulgated in 1940 did not make any reference to the requirements of the federal standard which Congress

introduced for the first time in the Transportation Act of 1940.—Indeed, on its face the exhibit list appears no more than a clerical or editorial revision of the last exhibit list under the 1920 Act. *Cf.* ICC Special Instructions Governing Certain Proceedings under Section 5 of the Act, April 9, 1934, para. (b).

The other item in the catalog of exhibits relied upon by petitioners is:

> "Exhibit 5, opinion of counsel of applicant or of the applicants and carriers that the transaction described in the application meets the requirements of the law and will be legally authorized and valid, if approved by the Commission with specific reference to any specially pertinent provisions of applicant's, or applicant's and carrier's charter or articles of incorporation." (49 C.F.R. § 52.3(b)(5))

Again, this language proves that an exhibit list is a dubious guide to statutory interpretation. Section 5(11), as revised in 1940, clearly says that when the Commission approves such a transaction, the parties "have full power . . . to carry such transaction into effect"; and that this power is "in addition to and in modification of its [the party's] powers under its corporate charter or under the laws of any state." The meaning of Exhibit 5 against this backdrop is obscure.

If the provisions of the rule providing for the required list of exhibits—which of course, most importantly, do not purport to express any substantive views by the Commission as to the ultimate relevance of the exhibit material—are somehow taken as having a substantive effect, the result is that the whole of the 1940 amendments to Section

5(11) is a dead letter.[12] There is no provision in the exhibit list which reflects the fact that Section 5(11) as revised in 1940 undeniably brings a federal standard of a majority general vote into the act for the first time. There is no reflection in the exhibit list that the 1940 amendment expressly requires a stockholder vote on certain transactions —whether or not state law or the corporate charter requires it—again for the first time; and there is no recognition in the exhibit list that the Commission's order, under the 1940 amendments to Section 5(11), affirmatively authorizes transactions notwithstanding whatever might be "any specially pertinent provisions of applicant's, or applicant's and carrier's charter or articles of incorporation." (Section 52.3(b)(5), 49 C.F.R. § 52.3(b)(5))

Thus, the Commission's exhibit list, if taken as having substantive effect, would substantially repeal virtually every feature of Section 5(11) that was introduced by the Transportation Act of 1940. It is rather strange, though perhaps reflective of the nature of petitioners' case, that they rely on an exhibit list having these infirmities as one of the props of their highly artificial construction of Section 5(11).

Similarly feeble are the references to certain language in Commission reports and in examiners' reports referring

[12] We put to one side the question of how much weight should be given to the Commission's views on this subject in any event, even if it had ever expressed any views as to the voting requirements under § 5(11). The same reasons that have led all the parties to agree that the questions involved in this case are not within the Commission's primary jurisdiction lead to the conclusion that such an expression of views would not be a material guide to the interpretation of the statute. It might here be remembered that the Commission's views in the *Schwabacher* case were to the effect that state-law-created rights of dissent and appraisal were to be recognized in a consolidation approved by it under § 5(2). See *Schwabacher* v. *United States*, *supra*, 334 U.S., at 188.

to the fact that certain carriers have complied with class voting requirements imposed by state law or by their corporate charters in connection with merger and consolidation proposals submitted to the Commission. (See A-S Br. 23-24) Indeed, at one point these recitals are enthusiastically referred to as "holdings", "decisions", and "findings". (A-S Br. 24) They are nothing of the kind. Even those of petitioners' references which are not out-and-out miscitations[13] are simply to recitals in Commission reports or hearing examiners' reports that such and such a vote has been held; in none of the cases was there any litigated issue as to what sort of vote should be held; indeed, the Commission has never interpreted the voting requirements of Section 5(11) in any decided case. It is rare when any of the recitals even rises to the level of an *obiter dictum*. They show no consideration of the legal problems involved. Even when added to the Commission's exhibit list, these recitals add up to a cipher.[14]

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[13] Thus, petitioner in No. 359 asserts that "the decision [*sic*] in *Chicago & N. W. Ry.*, 328 I.C.C. 126, 133" amounts to a "finding [*sic*] that the Rock Island required class-vote approval" to effect a merger. Page 133 of the report, and indeed the report generally, will be read without finding even any recited reference to such a class vote; the only reference is to a general two-thirds vote, as required by the law of Delaware; to which general vote, of course, § 5(11) would make deference.

[14] In their search for authority, petitioners delve into the applications on file with the Commission to determine if, unrecited even at the level of Commission hearing examiner reports, there has been had a class vote by a carrier proposing a merger or consolidation. Not surprisingly, petitioners find a number of such cases. (A-S Br. 23) Since there had never been any appellate decision on the meaning of § 5(11)'s provisions about voting prior to the decision of the court below, it would be an unusual corporate lawyer, not to say a rash one, who would not have recommended obtaining a class vote where his state law required one, and one could readily be obtained. The conservatism of the corporate bar in the face of an uninterpreted statute, like the voting provisions of § 5(11), is hardly a guide to the interpretation of that Act when occasion for

V. SECTION 5(11) OF THE INTERSTATE COMMERCE ACT PERMITS ONLY THE INCORPORATION BY REFERENCE OF STATE LAW REQUIREMENTS FOR A GREATER-THAN-MAJORITY GENERAL VOTE, NOT STATE LAW REQUIREMENTS FOR A CLASS VOTE, ON A MERGER OR CONSOLIDATION.

Should the Court disagree with our contentions (1) that the MoPac Articles do not provide for a class vote on this consolidation, (2) that the Missouri Business Corporation

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it arises. Indeed, the material cited by petitioners (A-S Br. 23) is often so vague that it is impossible to tell whether there was an antecedent design to take a class vote or whether a general vote was taken and then reported by classes—which would be fairly easy since transfer agents universally keep the stock books by classes.—None of the recited applications, we should add, involves a Missouri corporation.

Indeed, a number of these class votes were taken after the institution of the lawsuits in the present case. The possibility of being promptly faced with three or more lawsuits if he neglected to take a class vote would certainly intensify the conservatism with which a corporate lawyer would approach the question whether a class vote was required, and lead him to obtain one if at all possible, pending the final determination of this case. The three complaints in this case were filed commencing on December 9, 1963. In *Chicago & N.W.-Chicago Great W.*, I.C.C. Fin. Dkt. No. 23,388, the Board of Directors did not act until September 1964, and the stockholders thereafter; in *Chicago & N.W.-Chicago, Milwaukee & St. P.*, I.C.C. Fin. Dkt. No. 24,182, the vote occurred in May 1965.

The only sort of inference that can be drawn from practice in obtaining or not obtaining a given sort of vote is that which can be drawn from cases where a certain vote is *not* obtained. In cases where a superfluous vote is obtained, no one can make challenge. In cases where a particular vote is not obtained, the fact that it was not obtained can be challenged either by dissident stockholders or by the administrative officer who must accept for filing the certificate respecting the vote in question. In this light, the fact that in the Missouri-Kansas-Texas merger, discussed in the Brief of the other respondents, the two-thirds vote specified in Chapter 351 of the Missouri Revised Statutes was not obtained, but simply the majority vote specified in Chapter 388, is persuasive on the points that we, and the other respondents, make with respect to the problems of Chapter 351 and Chapter 388. See point II, pp. 48-56, *supra*.

Law is not "applicable State law" for the purposes of Section 5(11) of the Interstate Commerce Act, (3) that in any event, the Missouri Business Corporation Law does not give effect to a charter requirement of a class vote on a merger or consolidation, and (4) that Section 5(11) of the Interstate Commerce Act does not incorporate by reference "voluntary votes," not imposed as a general requirement by "applicable State law," but simply by a corporate charter to which state law defers, there will remain a final question—not passed on by the Court of Appeals. That is the question whether, in any event, Section 5(11) of the Interstate Commerce Act would incorporate by reference a state law provision for a class vote, or whether it is limited to incorporating by reference state law provisions for a greater-than-majority vote.[1]

1. The statutory text supports the conclusion that it is so limited. On its face, Section 5(11) does not fit the case of a state statute providing for a class vote upon a merger or consolidation, but simply the case of a state law altering the federal statutory requirement of a majority general vote, to provide for a different proportion of a general vote.[2] The language and grammatical structure show this. To quote, once again, the applicable language, the vote required is:

> "the assent . . . of a majority, unless a different vote is required under applicable State law, in which case

[1] We have found no state merger statute providing for a less-than-majority vote.

As we have stated, here the Court of Appeals so applied § 5(11) by holding that it incorporated the two-thirds general voting requirement of Mo. Rev. Stat. § 351.425.

[2] Whatever may be thought of the relevance of the Commission rule as to the exhibits to be filed with merger applications, which we discuss at pp. 82-86, above, it is plain that it does not contain any reference whatsoever to a class vote.

the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation. . . . "

The starting point is the unquestionable fact that the basic standard is a "majority . . . of the votes of the holders of the shares entitled to vote of the capital stock of such corporation," that is, a majority *general* vote. The statute permits state law to prescribe a "different vote"; but the permitted difference is only with respect to the "number." What is the "number" which the state law is permitted to vary? The "number . . . of the votes of the holders of the shares entitled to vote of the capital stock of such corporation"—that is, of the voting stockholders taken overall in a general vote. The basic federal standard, then, is a majority general vote of the voting stockholders; the permissible variation, under the statute, is in the "number" of the stockholders who will be required to assent in that general vote.—The statute contains no reference whatsoever to class voting; if it had been desired by the draftsman to have included a reference to class voting required under applicable state law, a few words would have sufficed.

The purpose of the approach of the federal statute in not providing for class voting is plain; class voting is essentially a measure of protection for the rights of minority stockholder classes. In the ordinary, unregulated industry, mergers or consolidations may be effected without administrative approval, subject only to the requirements of state law with respect to stockholder voting. If there is no provision for a class vote on such mergers or consolidations, the possibility of overreaching with respect to a minority class is present. The class vote "veto" is the only real protection. But in the case of a rail merger

subject to the Commission's jurisdiction under Section 5(2), the fairness of the merger or consolidation to all classes of stockholders is a responsibility of the Commission.[3] The omission of any provision for class voting, then, in Section 5(11) is hardly to be assumed to be an oversight, particularly in view of the felt deficiency of the 1920 Transportation Act which permitted desirable rail unifications to be blocked by "troublesome minorities."

2. Many of the same contentions which we have developed at pp. 21-25, above, and in point IV, above, pp. 66-82, with respect to the overall purpose of the 1940 amendments to Section 5—to facilitate rail consolidations and mergers, and to minimize the disruptive effect of discordant state laws and corporate charters—apply equally to the conclusion that Section 5(11) should not be read as deferring to a class vote where state law requires it. As we have there indicated, the general purpose of Congress in the 1940 Act in facilitating rail mergers and consolidations, and in reducing the scope of state law provisions which might make them more difficult, supports a literal interpretation of Section 5(11), one which does not extend to the incorporation by reference of state-required class voting.

Section 5(11) represents Congress' resolution of two principles of policy. One principle is the long-standing principle that railroad mergers are to be voluntary transactions—transactions proposed by and approved on behalf of the carriers participating in them. *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298 (1954). The other principle is the avoidance of the blocking of mergers by "troublesome minorities." See pp. 69-71, *supra*. As the

[3] See Senator Pittman's remarks, n. 8, pp. 78-79, *infra*.

Commission put the two themes shortly before the 1940 Act was adopted: "Legal compulsion can be used with advantage to bring recalcitrants and stragglers into line, but not to drive hostile majorities into action." (ICC Ann. Rep. (1938), p. 23, quoted in *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co., supra,* 347 U.S., at 306.)

These two principles are readily reconciled by a holding that the assent of the stockholders of a corporation to a voluntary rail merger is to be signified by such proportion of a general vote of the stockholders as state law provides, but that a particular class of stockholders is not to have a veto power, through a class vote requirement, over rail mergers and consolidations.[3] The protection of minority classes of the stockholders—which in the case of nonregulated corporations must often be fulfilled in large part by class voting provisions—under the federal law is left to the informed judgment of the Commission in passing on whether the proposed rail consolidation is "just and reasonable."

3. Certain of the specifics of the rail consolidation bills proposed in the two decades between the 1920 Act and the 1940 Act[4] support this view. One of the alternative proposals before Congress in this period—coming from that respected source, the Federal Coordinator of Transportation, Commissioner Joseph B. Eastman, provided for a class vote on railroad mergers.[5] This proposal, contained in Eastman's Fourth Report as Coordinator in 1936, was certainly

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[4] See pp. 69-78, *supra.* See also Senator Fess' position, p. 71, *supra.*

[5] Section 10(c) of a draft bill submitted by Coordinator Eastman provided that the consolidation plan could be put into effect by the Commission if "accepted by two-thirds of the stock . . . of each class" of the carriers involved. H. R. Doc. 394, 74th Cong., 2d Sess. (1936), Appendix C, p. 74.

part of the proximate backdrop of the 1940 Act. It was available as a drafting precedent to the joint group which implemented the report of the Committee of Six. But it was not followed; instead, there was prepared, and enacted by Congress, a bill which makes no reference at all to class voting.

Finally, a comparison of Section 5(11) with other provisions of the Interstate Commerce Act supports the view that Section 5(11) does not defer to any "class voting" requirements under state law.[6] Section 20b of the Act, 49 U.S.C. § 20b, provides a procedure whereby, upon approval by the Commission, railroad securities may be modified. The powers of the Commission under this section are declared to be "exclusive and plenary," and the carriers involved are declared to be "relieved from the operation of all restraints, limitations, and prohibitions of law, federal, state, or municipal" in terms strikingly similar to the provisions of Section 5(11). Section 20b(5), 49 U.S.C. § 20b(5). But here Congress expressly provided that the requisite stockholders' approval be given by a class vote. Section 20b(2), 49 U.S.C. § 20b(2). This section makes it plain that when Congress wanted to specify a class vote, or to provide for one, on a corporate matter affecting rail carriers, it did so explicitly. Its failure to provide for a class

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[6] Petitioners have suggested that our interpretation would cause confusion with respect to the laws of those states where no general vote is provided on a merger, but the transaction must be approved by a specified proportion of each class of stock. Such state laws are apparently in effect in California, Hawaii, Massachusetts, Michigan, Nevada and New Hampshire. See p. 57, *supra*. But even a smattering of mathematics should teach the conclusion that a requirement, for example, of a two-thirds vote by each class is tantamount to a two-thirds general vote plus a two-thirds vote by each class. ($2/3\ x + 2/3\ y = 2/3\ (x + y)$.) Thus the laws of a state, which, to use the same example, requires a two-thirds vote by each class, would be given effect, to the extent that Congress intended in § 5(11), by requiring a two-thirds general vote.

vote in Section 5(11), or to use apt language to incorporate state law requirements of a class vote, is accordingly even the more conclusive.

CONCLUSION

The issues in this case far transcend the question whether the particular proposal for a consolidation involved in this case, in its present form, is fair or unfair; indeed, that question is not an issue in this case at all. The real question in this case, as far as MoPac is concerned, is whether a tiny class of stockholders in MoPac, who are ordinarily entitled to exercise only 2.1% of the voting power of the corporation, are to have an absolute power of veto over any and all rail consolidations which MoPac may ever seek to effect.

But the issues are broader than simply MoPac's situation, since this Court cannot reverse the judgment of the Court of Appeals without making a determination on the two questions of federal law which we have discussed under points IV and V, above. A determination in favor of petitioners on these two points would greatly increase the power of minorities to block rail consolidations sponsored by corporate management and approved by the majority of the stockholders—consolidations which it is the purpose of the federal statute to foster.

We urge the Court to accept the judgment of the Court of Appeals' very thoughtful opinion that petitioners had not made out their case on the basis of the MoPac Articles or on the basis of state law (points I and III, above) for the reasons stated in the Court of Appeals' opinion and herein; in this case, of course, this Court need not reach the federal law questions. Should the Court be in

disagreement with the position of the Court of Appeals on the state law points, or if it should think it appropriate to pass on the federal law questions without passing on the state law questions (a course of action we do not suggest), we urge that the interpretation of Section 5(11) which we have developed in points IV and V, above, be adopted, and that the judgment of the Court of Appeals be affirmed on this basis.

Accordingly, for the reasons stated, the judgment should be affirmed.

Respectfully submitted,

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APPENDIX

Statutory Provisions

1. Sections 351.020, 351.090 and 351.430, Missouri Revised Statutes

Section 351.020, Missouri Revised Statutes, reads as follows:

> "Corporations for profit, excepting banking, insurance, railroad corporations, building and loan associations, savings banks and safe deposit companies, credit unions, mortgage loan companies, union stations, trust companies and exposition companies, may be organized under this Chapter [Chapter 351] for any lawful purpose or purposes."

Section 351.090, Missouri Revised Statutes, reads as follows:

> "1. Amendments to the articles of incorporation shall be made in the following manner:
>
> "(1) The board of directors may adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting, except that such proposed amendment need not be adopted by the board of directors and may be directly submitted to any annual or special meeting of shareholders;
>
> "(2) Written or printed notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given to each shareholder of record entitled to vote at such meeting within the time

and in the manner and upon the conditions provided in Section 351.230 for the giving of notice of meetings of shareholders;

"(3) At such meeting a vote of the shareholders entitled to vote shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of a majority of all of the outstanding shares entitled to vote, provided, however:

"(a) The number of directors shall not be decreased to less than three by amendment to the articles of incorporation when the number of shares voting against the proposal for decrease would be sufficient to elect a director if such shares were voted cumulatively at an election of three directors;

"(b) If any amendment provides for the creation or increase of preferential shares, then such amendment shall be adopted only upon receiving, in addition to the affirmative vote of the majority of all other outstanding shares entitled to vote, the following vote of each other class of shares, voting as a separate class, whether by the terms of the articles of incorporation such class be entitled to vote or not, over which such new or additional preferential shares would have a priority or with which such new or additional preferential shares would participate:

"a. In the case of corporations existing prior to the passage of this chapter, the articles of incorporation of which do not provide for the adoption of such an amendment upon a specified vote, the affirmative vote of at least seventy-five per cent of the outstanding shares of each such class which is subject to such priority or participation;

"b. In the case of corporations existing prior to the passage of this chapter, or of corporations organized under this chapter, the articles of incorporation of which do provide for the adoption of such an amendment upon a specified vote of such class of shares, the affirmative vote, but not less than a majority, of each such class, which is subject to said priority or participation, as specified in the articles of incorporation; and

"c. In case of corporations organized under this law the articles of incorporation of which do not provide for the adoption of such an amendment upon a specified vote of such class, the affirmative vote of at least a majority of each such class which is subject to said priority or participation;

"(c) If any amendment would alter or change the preferences, priorities, special rights or special powers given to any one or more classes of preferential shares by the articles of incorporation so as to affect such class or classes adversely, then the shareholders of each such class of preferential shares so affected by any such amendment shall vote thereon, whether by the terms of the articles of incorporation such class be entitled to vote or not, and the following vote of each such class of preferential shares so affected by the amendment shall be necessary to the adoption thereof, in addition to the affirmative vote of a majority of all other outstanding shares entitled to vote, namely:

"a. In the case of corporations existing prior to the passage of this chapter, the articles of incorporation of which do not provide for any such change or alteration upon a specified vote, the unanimous vote of each such class;

"b. In the case of corporations existing prior to the passage of this chapter, the articles of incorporation of which do provide for any such change or alteration on a specified vote, the affirmative vote of each such class as specified in the articles of incorporation, but not less than a majority of each such class;.

"c. In the case of corporations organized under this chapter, the articles of incorporation of which do not provide for any such change or alteration upon a specified vote, the vote of holders of seventy-five per cent of the outstanding shares of each such class; and

"d. In the case of corporations organized under this chapter, the articles of incorporation of which do provide for any such change or alteration upon a specified vote, the affirmative vote of each such class as specified in the articles of incorporation, but not less than a majority of each such class. Nothing contained in this paragraph (c) shall be construed to apply to any amendment providing only for the creation or increase of shares of any one or more classes.

"(4) In the case of corporations existing prior to the passage of this chapter, if the creation or increase of one or more classes of preferential shares is authorized by the affirmative vote of seventy-five per cent of the outstanding shares of any class or classes, voting as a class, as set out under subparagraph a of paragraph (b) of subdivision (3) of this subsection 1, then any holder of shares over which such new or additional preferential shares would have a priority or with which such new or additional preferential shares would participate, who shall not have voted in favor of the proposal to authorize said class or classes of

preferential shares, but at or prior to the meeting at which said proposal is submitted to a vote, shall file with the corporation written objections thereto, may, within twenty days after the vote was taken, make written demand on the corporation for the payment to him of the fair value of his shares as of the day prior to the date on which the vote was taken authorizing the creation or increase of said preferential shares. Such demand shall state the number and class of shares owned by such dissenting shareholder. Any shareholder failing to make demand within the twenty day period shall be conclusively presumed to have consented to the creation or increase of said preferential shares and shall be bound by the terms thereof. If, within thirty days after the day upon which such vote was taken, the value of such shares is agreed upon between the dissenting shareholder and the corporation, the corporation shall make payment of the agreed value, within ninety days after the day on which the vote was taken authorizing the creation or increase of said preferential shares, upon the surrender of his certificate or certificates representing the shares held by him. Upon payment of the agreed value, the dissenting shareholder shall cease to have any interest in such shares or in the corporation. If, within such period of thirty days, the dissenting shareholder and the corporation do not so agree, then the dissenting shareholder may, within sixty days after the expiration of the thirty day period, file a petition in any court of competent jurisdiction within the county in which the registered office of the corporation is situated, asking for a finding and determination of the fair value of the shares held by such shareholder and shall be entitled to a judgment against the corporation for

the amount of such fair value as of the day prior to the date on which such vote was taken, together with interest thereon to the date of such judgment. The judgment shall be payable only upon and simultaneously with the surrender to the corporation of the certificate or certificates representing said shares. Upon payment of the judgment, the dissenting shareholder shall cease to have any interest in such shares or in the corporation. Unless such dissenting shareholder shall file such petition within the time herein limited, such shareholder and all persons claiming under him shall be conclusively presumed to have ratified the creation or increase of said preferential shares and shall be bound by the terms thereof. Shares acquired by the corporation pursuant to the payment of the agreed value thereof or to the payment of any judgment entered therefor, as in this subdivision (4) provided, may be held or disposed of by the corporation as it shall see fit;

"(5) If any amendment made under section 351.085 effects a reduction of stated capital, then the corporation making such amendment shall comply with the applicable provisions of sections 351.195 and 351.200, as well as the provisions of this section.

"2. Any number of amendments may be submitted to the shareholders and voted on by them at one meeting."

Section 351.430, Missouri Revised Statutes, reads as follows:

"Upon such approval, articles of merger or articles of consolidation shall be executed in duplicate by each corporation by its president or a vice-president, and

verified by him, and the corporate seal of each corporation shall be thereto affixed, attested by its secretary or an assistant secretary, and shall set forth:

"(1) The plan of merger or the plan of consolidation;

"(2) As to each corporation, the number of shares outstanding;

"(3) As to each corporation, the number of shares voted for and against such plan, respectively."

2. Chapter 388, Missouri Revised Statutes

The pertinent provisions of Chapter 388, Missouri Revised Statutes, read as follows:

"INCORPORATION AND ORGANIZATION OF RAILROAD CORPORATIONS

"388.010. 'Railroad corporation' defined

"The term 'railroad corporation' contained in this chapter shall be deemed and taken to mean all corporations, companies or individuals now owning or operating, or which may hereafter own or operate, any railroad in this state.

"388.020. Chapter to govern

"All existing railroad corporations within this state, and such as may be hereafter chartered or formed, shall, respectively, have and possess all the powers and privileges contained in this chapter; and they shall be subject to all the duties, liabilities and provisions not inconsistent with the provisions of their charter herein contained.

"388.030. Who may form corporation—articles of association—where filed

"1. Any number of persons, not less than five, may form a company for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property; and for that purpose may make and sign articles of association, in which shall be stated the name of the company, the number of years the same is to continue, the places from and to which the road is to be constructed or maintained or operated, the length of such road, as near as may be, and the name of each county in the state through or into which it is made or intended to be made, the amount of the capital stock of the company, which shall not be less than ten thousand dollars for every mile of standard or broad gauge, nor less than five thousand dollars for every mile of narrow gauge road constructed or proposed to be constructed, and the number of shares of which said capital stock shall consist, and the names and places of residence of the directors of the company, not less than five nor more than twenty-one in number, who shall manage its affairs for the first year, and until others are chosen in their places.

"2. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in said company.

"3. On compliance with the provisions of section 388.040, such articles of association may be filed in the office of the secretary of state, who shall endorse thereon the day they are filed, and record the same in a book to be provided by him for that purpose; and

thereupon the persons who have so subscribed such articles of association, and all persons who shall become stockholders in said company, shall be a corporation by the name specified in such articles of the association, and shall possess the powers and privileges granted to corporations, and be subject to the provisions relating thereto contained in this chapter.

"388.040. Articles of association, when filed—incorporation fee

"1. Such articles of association shall not be filed and recorded in the office of the secretary of state, until at least one thousand dollars of stock for every mile of standard or broad gauge railroad, nor until at least five hundred dollars of stock for every mile of narrow gauge railroad proposed to be made, is subscribed thereto and five per cent paid thereon, in good faith and in cash to the directors named in said articles of association; nor until there is endorsed thereon, or annexed thereto an affidavit, made by at least three of the directors named in said articles, that the amount of stock required by this section has been in good faith subscribed, and five per cent paid in cash thereon, as aforesaid, and that it is intended, in good faith, to construct or maintain and operate the broad, standard or narrow gauge road mentioned in such articles of association; which affidavit shall be recorded with the articles of association, as aforesaid.

"2. Provided, that such articles of association shall not be filed and recorded until such corporation or association shall pay into the state treasury fifty dollars for the first fifty thousand dollars or less of the capital stock of the corporation or association, and a further

sum of five dollars for every additional ten thousand dollars of its capital stock, as provided by law."

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"388.220. Amendment of articles of incorporation—method

"1. A railroad corporation may amend its articles of incorporation from time to time in any and as many respects as may be desired; provided, that its articles of incorporation as amended contain only such provisions as might be lawfully contained in original articles of incorporation if made at the time of making such amendment, and, if a change in shares or an exchange or reclassification of shares is to be made, such provisions as may be necessary to effect such change, exchange or reclassification as may be desired and as is permitted by this section. In particular, and without limitation upon such general power of amendment, a railroad corporation may amend its articles of incorporation from time to time so as:

"(1) To change its corporate name;

"(2) To change its period of duration;

"(3) To change, enlarge or diminish its corporate purposes;

"(4) To increase or decrease the number of its directors to not more than twenty-one, nor less than three;

"(5) To increase or decrease the aggregate number of shares of any class which the corporation has authority to issue;

"(6) To increase or decrease the par value of the authorized shares of any class having a par value,

whether issued or unissued; provided, that if the par value of issued shares is increased there shall be transferred to stated capital at the time of such increase an amount of surplus equal to the aggregate amount by which the par value is increased;

"(7) To exchange, classify, reclassify or cancel all or any part of its shares, whether issued or unissued. The creation, alteration or abolition, in whole or in part, of designation, preferences, privileges or voting powers of any shares previously authorized, or the restrictions or qualifications thereof (including the creation, alteration or abolition of any provisions or rights in respect of the redemption of any shares; or any cumulative or noncumulative dividends, whether or not accrued, which shall not have been declared; or any accumulated but unexpended installment of any sinking fund whether or not set aside for the redemption or purchase of any shares; or any preemption right to subscribe for shares or other securities of the corporation whether existing at law or contained in the articles of incorporation or other certificate filed pursuant to law), shall be deemed to be a classification or reclassification of such shares for the purpose of this section;

"(8) To change the designation of all or any part of its shares, whether issued or unissued, and to change the preferences, qualifications, limitations, restrictions and special or relative rights including convertible rights in respect of all or any part of its shares, whether issued or unissued;

"(9) To change shares having a par value, whether issued or unissued, into the same or a different number of shares without par value, and to change shares with-

out par value, whether issued or unissued, into the same or different number of shares having a par value;

"(10) To create a new class or classes of stock and to define the preferences, qualifications, limitations, restrictions, and the special or relative rights of the shares of such new class or classes.

"2. Amendments to the articles of incorporation shall be made in the following manner:

"(1) The board of directors shall adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting;

"(2) Written or printed notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner and upon the conditions provided in section 351.230, RSMo 1949, for the giving of notice of meetings of shareholders;

"(3) At such meeting a vote of the shareholders entitled to vote thereat shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of a majority of the outstanding shares entitled to vote, provided, however,

"(a) That if any amendment provides for an increase of shares, then such amendment shall be adopted only upon receiving the affirmative vote of persons holding a larger amount in value of the outstanding shares;

"(b) That if any amendment provides for the creation or increase of preferential shares, then such amendment shall be adopted only upon receiving the affirmative vote of a majority of all outstanding shares, including shares not entitled to vote by the articles of incorporation; and

"(c) That if any amendment would alter or change the preferences, priorities, special rights or powers given to any one or more classes of shares by the articles of incorporation so as to affect such class or classes adversely, or if any amendment classifies or reclassifies outstanding shares of any class, or authorizes shares having preferences which are in any respect superior to the preferences of the outstanding shares of any class having preferences, or provides that shares of any class may be converted into shares of any other class or into shares or any other series of the same class, or alters the term or conditions of shares of any class which are either convertible or issuable upon conversion, then the shareholders of each such class of shares so affected by any such amendment shall vote thereon, whether by the terms of the articles of incorporation such class be entitled to vote or not, and the following vote of each such class of shares so affected by the amendment shall be necessary to the adoption thereof, in addition to the affirmative vote of other shares as in this subdivision (3) required, namely:

"a. In the case of corporations, the articles of incorporation of which do provide for any such change or alteration on a specified vote, the vote of each such class as specified in the articles of incorporation; and

"b. In the case of corporations, the articles of incorporation of which do not provide for any such change or alteration upon a specified vote, the vote of holders of seventy-five per cent of the outstanding shares of each such class."

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"388.290. Companies may consolidate, when

"1. Any two or more railroad companies in this state, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the state, or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation, the companies interested may enter into contract fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a meeting of the stockholders regularly called for the purpose, or by the approval, in writing, of the persons or parties holding and representing a majority of such stock.

"2. A certified copy of such articles of agreement, with the corporate name to be assumed by the new company, shall be filed with the secretary of state, when the consolidation shall be considered duly consummated, and a certified copy from the office of the secretary of state shall be deemed conclusive evidence thereof.

"3. The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and issuing certificates of stock in the new consolidated company, under such corporate name as may have been adopted; provided, however, that the foregoing provisions of this section shall not be construed to authorize the consolidation of any railroad companies or roads, except when by such consolidation a continuous line of roads is secured, running in the whole or in the main in the same general direction; and provided, it shall not be lawful for said roads to consolidate in the whole or in part, when by so doing it will deprive the public of the benefit of competition between said roads.

"4. And in case any such railroad companies shall consolidate or attempt to consolidate their roads contrary to the provisions of this section, such consolidation shall be void, and any person or party aggrieved, whether stockholder or not, may bring action against them in the circuit court of any county through which such road may pass, which court shall have jurisdiction in the case and power to restrain by injunction or otherwise.

"5. And in case any railroad in this state shall hereafter intersect any such consolidated road, said road or roads shall have the right to run their freight cars without breaking bulk upon said consolidated road, and such consolidated road shall transact the business of said intersecting or connecting road or roads on fair and reasonable terms.

"6. Before any railroad companies shall consolidate their roads, under the provisions of this section, they

shall each file with the secretary of state a resolution accepting the provisions thereof, to be signed by their respective presidents and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each, at a meeting of the stockholders to be called for the purpose of considering the same, sixty days' public notice of the time, place and purpose of such meeting having been given by advertisement in some newspaper printed in the county where the general offices of said company or companies of this state are situated."

"388.300. Aiding other railroads to form connection—terms

"1. Any railroad company heretofore incorporated or hereafter organized in pursuance of law, may, at any time, by means of subscription to the capital stock of any other railroad company, or otherwise, aid such company in the construction of its railroad within or without the state, for the purposes of forming a connection of the last mentioned road with the road owned by the company furnishing such aid, or any such railroad company which may have built its road to the boundary lines of the state may extend into the adjoining state, and for that purpose may build, buy, lease or consolidate, in the manner provided in section 388.290, with any railroads in such adjoining state, and operate the same, and may own such real estate and other property in such adjoining state as may be convenient in operating such road; or any railroad company organized in pursuance of the laws of this or any other state, or of the United States, may lease or purchase all or any part of a railroad, with all its

privileges, rights, franchises, real estate and other property, the whole or a part of which is in this state, and constructed, owned or leased by any other company, if the lines of the road or roads of such companies are continuous or connected at a point either within or without this state, upon such terms as may be agreed upon between said companies respectively; or any railroad company duly incorporated and existing under the laws of any state of the United States may extend, construct, maintain and operate its railroad into and through this state, and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this state upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this state concerning railroad corporations, as fully as if incorporated in this state.

"2. Provided, that no such aid shall be furnished, nor any purchase, lease, subletting or arrangements perfected until a meeting of the stockholders of said company or companies of this state, party or parties to such agreement, whereby a railroad in this state may be aided, purchased, leased, sublet, consolidated or affected by such arrangements, shall have been called by the directors thereof, at such times and places and in such manner as they shall designate, sixty days' public notice thereof having been previously given and the holders of a majority of the stock of such company, in person or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented thereto, in writing, and a certificate thereof, signed by the president and secretary of said company or companies,

shall have been filed in the office of the secretary of state.

"3. And provided further, that if a railroad company of another state shall lease a railroad, the whole or a part of which is in this state, or make arrangement for operating the same as provided in sections 388.290 and 388.300, or shall extend its railroad into this state, or through this state, such part of said railroad as is within this state shall be subject to taxation, and shall be subject to all regulations and provisions of law governing railroads in this state; and a corporation in this state leasing its road to a corporation of another state, or licensing or permitting a corporation of another state, under any running arrangement, to run engines and cars upon its road in this state, shall remain liable as if it operated the road itself; and a corporation of another state, being a lessee of a railroad in this state, or running its engines and cars upon a railroad in this state under a license, permit or running arrangement, shall likewise be held liable for the violation of any of the laws of this state, and may sue and be sued in all cases and for the same causes and in the same manner as a corporation of this state might sue or be sued if operating its own road; but a satisfaction of any claim or judgment by either of said corporations shall discharge the other; and a corporation of another state, being the lessee as aforesaid, or extending its railroad as aforesaid into or through this state, shall establish and maintain an office or offices in this state, at some point or points on the line of the road so leased or constructed and operated, at which legal process and notice may be served as upon railroad corporations of this state."